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Editor’s Note

We are pleased to present the 2015 edition of our Public Company Survival Guide, a key resource designed to assist those responsible for compliance with certain requirements attendant to being a US public company. This guide includes sample corporate governance documents and memoranda for NYSE and NASDAQ listed issuers and provides key resources for certain reports that must be filed with the US Securities and Exchange Commission (SEC). This guide also provides summaries of recent developments in US federal securities laws and regulations, quick reference charts for events that may trigger routine reporting obligations with the SEC and templates, such as sample board and committee minutes and director and executive officer questionnaires, that can be modified to fit your company’s specific needs.

Although this guide is intended to assist those charged with ensuring that their companies are in compliance with certain corporate governance, reporting and disclosure obligations under the Securities Exchange Act of 1934, as amended, it should not be used as a replacement for a careful analysis of US federal securities laws. In addition, this guide does not address the accounting requirements or industry-specific guides under the US federal securities laws, or the requirements of any other laws, rules and regulations that may apply to your company and its business.

A list of some of the additional publications and resources provided by our firm follows below. To request a copy of these materials, please contact the Baker & McKenzie attorney with whom you work or email our marketing department at the address noted.

This guide is a product of numerous contributions from several practitioners in our firm, including Christopher M. Bartoli, Roger W. Bivans, Amar Budarapu, William D. Davis II, Heath Trisdale, W. Crews Lott, and editor, Jennifer L. Brevelle.
The materials in this guide are current only as of October 2015. Because the laws, rules, regulations, and listing standards discussed herein change frequently, we recommend that you periodically monitor updates to the requirements particular to your company together with the Baker & McKenzie attorney with whom you work, or any of the following:

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Additional Publications Available

- **Cross-Border Listings Handbook & App.** This handbook is a comprehensive multi-jurisdictional guide to listing securities around the world. The handbook, and related app for iPhone and iPad, contain summaries of the listing requirements for more than 35 stock exchanges, primarily from the view of a foreign company considering a listing abroad. For more information, please visit [http://www.bakermckenzie.com/crossborderlisting/](http://www.bakermckenzie.com/crossborderlisting/).

- **Guide to US Securities Laws for Foreign Private Issuers.** This publication summarizes the consequences of registering securities of a foreign private issuer in the US under US federal securities laws and the creation of an active trading market in the US for the securities and is available in print and electronic format.

- **Guide to Being a US Public Company.** This handbook summarizes the routine US disclosure and corporate governance obligations that a US publicly traded company must satisfy on an ongoing basis and provides a general overview of what is required to comply. The guide is available in print and electronic format.

- **Annual Meeting Proxy Statement, Annual Report on Form 10-K and Quarterly Report on Form 10-Q Checklists.** We update our ‘34 Act reporting and compliance checklists on a bi-annual or annual basis as necessary to reflect current laws and regulations under the US federal securities laws. Summary sections of the checklists are available in this guide under “Exchange Act Reporting: Overview and Selected Forms.” The full checklists are available in print and electronic format.

- **A Legal Guide to Acquisitions and Doing Business in the United States.** This handbook provides guidance to non-US clients (lawyers and non-lawyers) to help understand the breadth and depth of business and legal considerations associated with conducting business in the US and is available in print and electronic format.
• **Customary Issues in Negotiating Cross-Border Acquisitions.** This publication provides a brief comparison/overview of certain key provisions in typical purchase agreements across a range of different jurisdictions and is available in print and electronic format.

• **Cross-Border Transactions Handbook.** This handbook provides guidance to help understand the breadth and depth of business legal considerations associated with cross-border transactions and suggests ways to navigate the transaction journey. The handbook is available in print and electronic format.

*All publications above may be ordered by contacting the Baker & McKenzie attorney with whom you work or by emailing na.cs@bakermckenzie.com.*

If you are interested in other Baker & McKenzie publications, please visit [www.bakermckenzie.com/publicationform](http://www.bakermckenzie.com/publicationform).

**Baker & McKenzie**

Founded in 1949, Baker & McKenzie advises many of the world’s most dynamic and successful business organizations through more than 4,200 lawyers in 47 countries. Baker & McKenzie is known for having a deep understanding of the language and culture of business, an uncompromising commitment to excellence, and world-class fluency in its client service. Baker & McKenzie provides a full range of legal services, including a diversified corporate and securities practice representing US and international companies on all aspects of their US public reporting obligations and corporate governance practices as well as representing companies and underwriters on debt and equity securities offerings.
Governance Materials
Annotated Form of Audit Committee Charter

This form of audit committee charter is designed to comply with SEC rules on corporate governance and audit committee requirements,\(^1\) NYSE and NASDAQ listing standards\(^2\) and Public Company Accounting Oversight Board (PCAOB) auditing standards applicable to public companies and reflects what we consider as best practice. When reviewing committee charters and other governance policies, companies may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of their larger institutional stockholders, which are usually published and available on their websites.

**Latest Developments**

*PCAOB Concept Release on Audit Quality Indicators, Release No. 2015-005*

On July 1, 2015, the PCAOB issued a concept release seeking public comment on the content and possible uses of a group of potential “audit quality indicators.” The new indicators are a potential portfolio of quantitative measures that may provide new insights about how to evaluate the quality of audits and how high quality audits are achieved. Taken together with qualitative context, the indicators may inform discussions among those concerned with the financial reporting and auditing process, for example among audit committees and audit firms. The comment period on the release closed on September 29, 2015. The PCAOB also plans to convene a public roundtable to discuss this concept release during the fourth quarter of 2015. The concept release can be found at

\(^1\) See Regulation S-K Item 407(d).

http://pcaobus.org/Rules/Rulemaking/Pages/Docket041.aspx. Because this could impact communications between the audit committee and the auditors, we recommend that companies continue to monitor developments in this area.

**PCAOB Auditing Standard No. 18**

In 2014, the PCAOB adopted, and the SEC approved, Auditing Standard No. 18 (AS18), *Related Parties*, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. Directed at auditors, the new and amended auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions and (3) a company’s financial relationships and transactions with its executive officers. The standards also expand the required communications that an auditor must make to the audit committee related to these three areas, including communications of the auditor’s evaluation of the company’s relationships with related parties, further discussion between the auditor and audit committee regarding the business purpose of the company’s significant unusual transactions and additional discussion concerning the company’s financial relationships and transactions with its executive officers. They also amend the standard governing representations that the auditor is required to periodically obtain from management. AS18 supersedes interim auditing standard AU sec. 334, *Related Parties*. AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within the fiscal years. For more on this and a summary of AS18, see http://pcaobus.org/Rules/Rulemaking/Pages/Docket038.aspx and http://www.sec.gov/rules/pcaob/2014/34-73396.pdf. Additionally of note, under the new standards, auditors are expected to communicate with audit committees about executive compensation arrangements, and companies should consider whether the compensation committee should also be a part of those discussions. Because AS18 affects the
communications between the audit committee and the auditors, we recommend that audit committees discuss the new communication requirements and responsibilities together with the auditors.

Other Proposed Auditing Standards

On June 30, 2015, the PCAOB issued a supplemental request for comment on previous amendments it had proposed to its auditing standards to require public company and broker-dealer audit reports to include the name of the engagement partner who led the audit, along with certain other information about participants in the audit. The supplemental request indicated that the PCAOB is considering an alternative to disclosure of this information in the auditor’s report, whereby the information would be required to be disclosed on a new PCAOB form. The supplemental request for comment closed August 31, 2015. More on these proposals can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029.aspx.

On August 13, 2013, the PCAOB released two new proposed auditing standards: (1) The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion, which would supersede portions of AU sec. 508, Reports on Audited Financial Statements, and (2) The Auditor’s Responsibilities Regarding Other Information in Certain Documents Containing Audited Financial Statements and the Related Auditor’s Report, which would supersede AU sec. 550, Other Information in Documents Containing Audited Financial Statements. If adopted, the new auditing standards would significantly change the audit report model and dramatically expand the auditor’s responsibilities in reporting on management’s disclosures outside the financial statements. Expanding auditor reports to include company-specific information, such as the auditor’s views on significant audit issues, would change fundamentally the role of the auditor and the relationship between companies and their auditors. This is an issue that should be on the audit committee’s radar. The comment period on the proposed rules closed in December 2013; the PCAOB held a public meeting in April 2014 to obtain further input on the proposed rules. More on the
proposed auditing standards can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx. The PCAOB’s standard-setting agenda dated September 30, 2015 (available at http://pcaobus.org/Standards/Documents/201509-standard-setting-agenda.pdf) notes that “[t]he staff anticipates recommending that the Board issue a reproposal of the auditor’s reporting standard for public comment in the first quarter of 2016. The staff is continuing to evaluate the proposed other information standard in light of comments received and anticipates making a recommendation for next steps to the Board at a later date.”

Audit Committee Disclosures—SEC Commentary and Concept Release

In a May 2014 speech, SEC Chair Mary Jo White noted that investors have expressed significant interest in increased transparency into audit committee activities. Chair White noted that she had asked the SEC staff to consider whether audit committee reporting requirements can be improved to make the reports more useful to investors. Furthermore, in response to continued interest in this area by investors, on July 1, 2015, the SEC published a concept release seeking public comment on current audit committee disclosure requirements, focusing on the committee’s oversight of the independent registered public accounting firm. The release sought feedback on whether certain audit committee disclosures should be added, removed or modified to provide additional meaningful disclosures to investors. The scope of the matters covered in the release indicate that future rule changes could significantly expand the length of audit committee reports and other proxy disclosures and could lead to increased risk exposure for companies and their audit committee members. The comment period closed on September 8, 2015. Comments received can be found at http://www.sec.gov/comments/s7-13-15/s71315.shtml. Developments in this area are noteworthy given the increased focus on audit committee disclosures in recent proxy seasons. Companies should monitor this area for continuing developments.
This document is designed primarily for use by listed US domestic issuers that are not the types of entities that receive special treatment under the applicable SEC rules and exchange standards, such as controlled companies, smaller reporting companies, foreign private issuers or companies listing only preferred or debt securities. Although it may be a useful resource for other types of entities, including unlisted companies, it is not designed to be used as a model charter for such entities. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual market’s listing standards, which this document does not address.

We recommend that companies review this form of audit committee charter together with our form of corporate governance guidelines and public company bylaws. Because corporate governance guidelines and practices vary widely from company to company, this sample charter does not attempt to address all corporate governance functions that may be performed by the audit committee. This sample charter will need to be customized as necessary to reflect the role in corporate governance activities that is assigned to the audit committee. This form of audit committee charter does not contain any provisions regarding notice of meetings, procedure, quorum requirements or action by written consent as these matters are typically addressed in the bylaws. To the extent the bylaws do not contain such provisions, appropriate provisions should be included in the committee charter.

This form of audit committee charter is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.
Note: It is always recommended to monitor the latest SEC Compliance and Disclosure Interpretations related to corporate governance and disclosure available on the SEC’s website at http://www.sec.gov/divisions/corpfin/cfguidance.shtml.
Purposes

The primary purposes of the committee are to oversee on behalf of the board of directors:

- the company’s accounting and financial reporting processes and the integrity of its financial statements;

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1 The company’s articles, bylaws, equity compensation and other benefit plans, corporate governance guidelines, and other committee charters should be reviewed to ensure that this charter is consistent with each of those documents. The company may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of its larger institutional stockholders, which are usually published and available on their websites.

2 The NACD Blue Ribbon Commission released the Report for Audit Committees in October 2010. We recommend the audit committee review the report and recommendations. For more information, see http://www.prnewswire.com/news-releases/nacd-blue-ribbon-commissions-recommend-new-principles-for-audit-performance-metrics-and-board-evaluation-105162959.html.
• the audits of the company’s financial statements and the appointment, compensation, qualifications, independence and performance of the company’s independent auditors;

• the company’s compliance with legal and regulatory requirements; and

• the performance of the company’s internal audit function, internal accounting controls, disclosure controls and procedures and internal control over financial reporting.³

The committee also has the purpose of preparing the audit committee report that SEC rules require the company to include in its annual proxy statement.

The committee’s function is one of oversight only and does not relieve management of its responsibilities to (1) make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company, (2) devise and maintain an effective system of internal accounting controls, (3) devise and maintain effective disclosure controls and procedures and internal controls over financial reporting and (4) prepare financial statements that are accurate and complete and fairly present the financial condition, results of operations and cash flows of the company and further does not relieve the independent

³ These purposes are based on a combination of the minimum purposes that the NYSE and NASDAQ listing standards require to be stated in the charter. See the NYSE’s Listed Company Manual at §303A.07(b) and NASDAQ Marketplace Rule 5605(c)(1). The NYSE listing standards require all NYSE listed companies to maintain an internal audit function; other companies should consider whether or not to follow this governance standard. Although NASDAQ had filed a proposed rule change with the SEC in the spring of 2013 to require that listed companies have an internal audit function, it was withdrawn June 18, 2013 so that NASDAQ can adequately consider the comments received on the proposed rule. See http://www.sec.gov/rules/sro/NASDAQ/2013/34-69792.pdf and http://NASDAQ.chwallstreet.com/NASDAQ/pdf/NASDAQ-issalerts/2013/2013-003.pdf. As of the date of these materials, NASDAQ has not submitted a revised proposed rule to the SEC. We recommend that NASDAQ listed companies continue to monitor this matter and consult with the Baker & McKenzie attorney with whom they work for further guidance.
auditors of their responsibilities relating to the audit or review of financial statements.\(^4\)

**Composition**

*Membership.* The committee must consist of at least three directors.\(^5\)

*Independence.* All committee members must have been determined by the board to be independent, as defined and to the extent required in the applicable SEC rules and [NYSE] [NASDAQ] listing standards, as they may be amended from time to time (the “listing standards”), for purposes of audit committee membership and must otherwise meet the requirements for committee membership as determined by the listing standards.\(^6\)

*Financial literacy.* Each committee member must be financially literate upon appointment to the committee, as determined by the board in accordance with the listing standards.\(^7\) At all times, there

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\(^4\) This is an optional paragraph commonly included; the NYSE Listed Company Manual’s general commentary to §303A.07(b) acknowledges that “the fundamental responsibility for the company’s financial statements and disclosures rests with management and the independent auditor . . . .”

\(^5\) The listing standards require that the committee have at least three members.

\(^6\) Exchange Act Rule 10A-3 prohibits any compensation to audit committee members other than for board/committee service and precludes a director who is an affiliated person from serving on this committee (all as defined and implemented in the rule); NASDAQ/NYSE listing standards significantly revise existing requirements, including clarifications that certain past and current relationships with business or nonprofit organizations, family members who are officers and auditors, preclude independence. There is a NASDAQ “exceptional and limited circumstances” exception for a single director who does not meet certain of these criteria; however, as a matter of best practices, this charter does not contemplate that such a director would sit on the committee.

\(^7\) This is the NYSE standard. See NYSE Listed Company Manual §303A.07(a) and related commentary. For a NASDAQ issuer, the board would interpret the financial literacy qualification in light of the detailed NASDAQ standard (ability to read and understand fundamental financial statements, including a company’s balance sheet, income statement and cash flow statement). See NASDAQ Marketplace Rule .5605(c)(2)(A) and related interpretive materials. The NYSE listing standards also allow members to become financially literate within a reasonable period of time after appointment to the committee, but we consider it to be a best practice if at all possible to have financially literate committee members at the outset.
should be at least one committee member who, as determined by the board, is an audit committee financial expert as defined in the SEC rules [and meets any NASDAQ requirement for finance, accounting or comparable experience or background].

*Education.* The company may assist the committee in maintaining the appropriate financial literacy, and is responsible for providing the committee with educational resources related to accounting principles and procedures, current accounting topics pertinent to the company, and other matters as may be requested. The company may also provide new members with educational opportunities and appropriate orientation briefings.

*Appointment and removal.* Subject to any requirements of the listing standards, the board may appoint and remove committee members in accordance with the company’s bylaws. Committee members will serve for such terms as the board may fix, and in any case at the board’s will, whether or not a specific term is fixed. The board will

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8 See S-K Item 407(d)(5) for the definition of audit committee financial expert and the requirement to disclose whether or not there is one (and if not, why not). Neither the NASDAQ nor NYSE listing standards require an audit committee financial expert to serve on the committee. However, the NYSE has clarified in its listing standards that a board may presume that an audit committee financial expert will meet the NYSE requirements for accounting or related financial management expertise. Accordingly, we consider the requirement to have an audit committee financial expert to be a best practice. Because NASDAQ has not stated that an audit committee financial expert will meet the NASDAQ requirements for finance, accounting or comparable experience or background, the bracketed language is advisable for NASDAQ companies.

For issuers that are uncomfortable being required to maintain an audit committee financial expert, replace the last sentence with the following:

“At all times there must be at least one committee member who, as determined by the board, meets the [NYSE: accounting or related financial management expertise] [NASDAQ: finance, accounting or comparable experience or background] requirements of the listing standards. In addition, the committee must annually evaluate, and report to the company on a timely basis to enable the company to disclose under applicable SEC rules, whether or not at least one committee member is an audit committee financial expert as defined in the SEC rules.”

9 As noted above, the listing standards require that the committee have at least three members.

10 This should be reviewed carefully in conjunction with any requirements imposed by the company’s bylaws. For companies that would like definite terms for audit committee members,
designate a committee member as the chairperson of the committee.\footnote{Confirm that this is consistent with the bylaws and any other corporate governance documents.}

\textit{Service on other audit committees.}\footnote{This topic is currently covered only in the NYSE listing standards (see NYSE Listed Company Manual §303A.07(a) and related disclosure requirements), which in the absence of a company limitation on the number of audit committee memberships, require the board to determine that such committee service does not impair the member’s ability and disclose this determination in the company’s proxy statement or annual report.} No director is eligible to serve on the committee if he or she serves on more than two other public companies’ audit committees.\footnote{For NYSE companies that are not willing to limit directors’ audit committee memberships, replace this sentence with the following:}

\footnote{"The company does not limit the number of public company audit committees on which a committee member serves, but if a member does serve on more than two other public company audit committees, the board must have determined that this simultaneous service would not impair the member’s ability to serve on the company’s audit committee, and the company must disclose this determination in its proxy statement for its annual meeting."}
Independent auditors and their services

Overall authority. The committee has the sole authority and direct responsibility for the appointment, compensation, retention, termination, evaluation and oversight of the work of any independent registered public accounting firm engaged by the company for the purpose of preparing or issuing an audit report or related work or

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14 In 2012, the PCAOB adopted, and the SEC approved, Auditing Standard No. 16 (AS16), *Communications with Audit Committees*, and related and transitional amendments to PCAOB standards. The standard, directed at auditors, established requirements that enhance the relevance and timeliness of the communications between the auditor and the audit committee and was intended to foster constructive dialogue between the two on significant audit and financial statement matters. The standard supersedes auditing standards AU sec. 310, *Appointment of the Independent Auditor*, and SAS 61, as amended (AU sec. 380, *Communication with Audit Committees*), as adopted by the PCAOB in Rule 3200T, and amends other PCAOB standards. The rules became effective for public company audits of fiscal periods beginning on or after December 15, 2012. Under AS16, auditors are required to communicate certain information to the audit committee in a timely manner and before issuance of the auditor’s report. For more on this and a summary of the objectives of AS16, see http://pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_16.aspx and http://www.sec.gov/rules/pcaob/2012/34-68453.pdf.

In June 2014, the PCAOB adopted Auditing Standard No. 18 (AS18), *Related Parties*, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. The SEC approved the rules on October 21, 2014. Directed at auditors, the new and amended auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions, and (3) a company’s financial relationships and transactions with its executive officers. The standards also expand the required communications that an auditor must make to the audit committee related to these three areas, including communications of the auditor’s evaluation of the company’s relationships with related parties, further discussion between the auditor and audit committee regarding the business purpose of the company’s significant unusual transactions and additional discussion concerning the company’s financial relationships and transactions with its executive officers. They also amend the standard governing representations that the auditor is required to periodically obtain from management. AS18 supersedes interim auditing standard AU sec. 334, *Related Parties*. AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within the fiscal years. For more on this and a summary of AS18, see http://pcaobus.org/Rules/Rulemaking/Pages/Docket038.aspx and http://www.sec.gov/rules/pcaob/2014/34-73396.pdf. Additionally of note, under the new standards, it is anticipated that auditors will communicate with audit committees about executive compensation arrangements, and companies should consider whether the compensation committee should also be a part of those discussions. Because AS18 affects the communications between the audit committee and the auditors, we recommend that audit committees discuss the new communication requirements and responsibilities together with the auditors.
performing other audit, review or attest services for the company. The independent auditors report directly to the committee. The committee’s authority includes resolution of disagreements between management and the auditors regarding financial reporting and the receipt of communications from the auditors as may be required under professional standards applicable to the auditors.\(^\text{15}\)

**Terms of audit and non-audit engagements.** The committee must pre-approve all audit, review, attest and permissible non-audit services (including any permissible internal control-related services) to be provided to the company or its subsidiaries by the independent auditors. The committee may establish pre-approval policies and procedures in compliance with applicable SEC rules.\(^\text{16}\)

**Annual quality control report and review.**\(^\text{17}\) The committee must obtain and review, at least annually, a report by the independent auditors describing:

- the firm’s internal quality-control procedures; and

- any material issues raised by the most recent internal quality-control review, or peer review, of the auditing firm or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or

\(^\text{15}\) Based on Exchange Act Rule 10A-3(b)(2).

\(^\text{16}\) SEC rules adopted in 2003 limit the disclosure requirement relating to non-audit services to expanded categories of audit and non-audit fees to be explained in more detail in the annual meeting proxy statement under Item 9(e) of the proxy rules (or 10-K for issuers which do not file proxy statements) with a statement as to the percentage of listed non-audit services which were approved by the audit committee and a disclosure of any pre-approval policies and procedures implemented by the committee, and do not require disclosure in quarterly reports as a general matter. In 2007, the PCAOB adopted Rule 3525, in connection with seeking audit committee pre-approval of non-audit services related to internal control over financial reporting available at [http://pcaobus.org/Rules/PCAOBRules/Pages/Section_3.aspx#rule3525](http://pcaobus.org/Rules/PCAOBRules/Pages/Section_3.aspx#rule3525).

\(^\text{17}\) The annual quality control report and review are required only by the NYSE listing standards (see NYSE Listed Company Manual §303A.07(b)(iii)(A)) but can be a good practice for other public companies as well.
more independent audits carried out by the firm, and any steps taken to deal with any such issues.

In addition, the committee’s annual review of the independent auditors’ qualifications must also include the review and evaluation of the lead partner of the independent auditors for the company’s account, and evaluation of such other matters as the committee may consider relevant to the engagement of the auditors, including views of company management and internal finance employees, and whether the lead partner or auditing firm itself should be rotated.

**AS 18 review.** Discuss with the independent auditors the matters required to be discussed by PCAOB Auditing Standard No. 18 and other related auditing standards, including without limitation information regarding the company’s relationships with related parties, the company’s significant unusual transactions and the company’s financial relationships and transactions with its executive officers, if any.\(^{14}\)

**Policy on hiring employees of the auditors.** The committee will from time to time establish hiring policies that will govern the company’s hiring of employees or former employees of the independent auditors, taking into account possible pressures on the auditors’ personnel who might seek a position with the company, and report these policies to the full board.\(^ {18}\)

**Annual financial reporting\(^ {19}\)**

As often and to the extent the committee deems necessary or

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\(^{14}\) This is required only by the NYSE standards (see NYSE Listed Company Manual §303A.07(b)(iii)(G)).

\(^{18}\) The SEC’s project to evaluate whether to incorporate International Financial Reporting Standards (IFRS) into the financial reporting system for US issuers can be found at [http://www.sec.gov/spotlight/globalaccountingstandards.shtml](http://www.sec.gov/spotlight/globalaccountingstandards.shtml). We recommend the audit committee stay abreast of any future developments in this area.
appropriate, but at least annually in connection with the audit of each fiscal year’s financial statements, the committee will:

1. **Discuss financial statements and internal control reports with management.** Meet to review and discuss with appropriate members of management, the independent auditors and, if appropriate, internal auditors:

   - the audited financial statements;
   - related accounting and auditing principles and practices; and
   - management’s assessment of internal control over financial reporting and the related report and attestation on internal control over financial reporting to be included in the company’s annual report on Form 10-K (when such reports are required under SEC rules).

2. **Critical accounting policy report.** Timely request and receive from the independent auditors (before the filing of any audit report) the report or update required pursuant to applicable SEC rules concerning:

   - all critical accounting policies and practices to be used;
   - all alternative treatments within generally accepted accounting principles for policies and practices relating to material items that have been discussed with company management, including ramifications of the use of such alternative

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20 For updated guidance from the SEC on accounting and related disclosure matters, see our Checklist for Preparing Form 10-K.

21 S-K Item 407 requires the audit committee report in the proxy statement to disclose whether the committee discussed the financial statements with management.

22 The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") permanently exempted non-accelerated filers from the auditor attestation requirements of Section 404(b) under the Sarbanes-Oxley Act of 2002.
disclosures and treatments and the treatment preferred by the independent auditors; and

- other material written communications between the independent auditors and company management, such as any management letter or schedule of unadjusted differences.\textsuperscript{23}

3. \textit{AS 16 review}. Discuss with the independent auditors the matters required to be discussed by PCAOB Auditing Standard No. 16.\textsuperscript{24}

4. \textit{MD&A}. Review and discuss with appropriate members of management and the independent auditors the specific intended disclosures under “Management’s Discussion and Analysis of Financial Condition and Results of Operations” to be included in the company’s annual report on Form 10-K.\textsuperscript{25}

5. \textit{Independence disclosure}. Receive from the independent auditors all written statements and other communications relating to their independence from the company that may be required under the then applicable rules governing independent auditors.\textsuperscript{26}

\textsuperscript{23} Sarbanes-Oxley Sec. 204, implemented via SEC rules adopted in January 2003. See Rule 2-07 of Regulation S-X.

\textsuperscript{24} See footnote 14. Generally, this communication with the audit committee is required by PCAOB AS16 (formerly Codification of Statements on Auditing Standards on Auditing Standards, AU§380, \textit{Communication with Audit Committees} (“SAS 61”) (adopted by the PCAOB as an interim auditing standard in April 2003 pursuant to Rule 3200T)). Note that this requirement under Exchange Act, Regulation S-K Item 407(d) requires the audit committee report in the proxy statement to disclose whether this communication occurred. As of the date of these materials, the SEC has yet to update the former references to SAS 61 in Item 407(d) of Regulation S-K.


\textsuperscript{26} This communication is required by the auditing standards and listing standards; Regulation S-K Item 407 requires the audit committee report in the proxy statement to disclose whether this occurred. NYSE Listed Company Manual §303A.07 and NASDAQ Marketplace Rule 5605(c)(1)(B), require the audit committee to have an “active dialogue” with the auditors about all relationships to assess independence, noted in provision 6. NASDAQ commentary under its listing standard on this point requires the charter to include the committee’s “responsibility to ensure the independence of the outside auditor.” The NYSE commentary to its listing standard
6. **Auditor independence.** Actively discuss with the independent auditors any disclosed relationships or services that may impact their objectivity and independence, and take any other appropriate action to oversee their independence.27

7. **Material issues.** To the extent the committee deems necessary or appropriate, discuss with the independent auditors material issues on which the company’s audit team consulted the independent auditors’ national office.28

8. **Audit Committee Report and recommendation to file audited financial statements.** Recommend to the board whether the company’s annual report on Form 10-K to be filed with the SEC should include the audited financial statements29 and timely prepare the audit committee report and other information required to be included in the company’s annual meeting proxy statement.30

makes clear that the committee’s duty is to evaluate the auditor’s qualifications, performance and independence. Note that in April 2008, the PCAOB adopted Rule 3526, *Communication with Audit Committees Concerning Independence*. Rule 3526, approved by the SEC in August 2008, requires a registered public accounting firm, before accepting an initial engagement pursuant to the standards of the PCAOB, to describe in writing to the audit committee all relationships between the firm or any of its affiliates and the issuer or persons in a financial reporting oversight role at the issuer that may reasonably be thought to bear on the firm’s independence. Registered firms are also required to discuss with the audit committee the potential effects of any such relationships on the firm’s independence. Rule 3526 requires firms to make a similar communication annually for continuing engagements. Rule 3526 supersedes the board’s interim independence requirement, Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees*, and two related interpretations.

27 Listing standards require active dialogue on this point; Regulation S-K Item 407 requires the audit committee report in the proxy statement to disclose whether this occurred.

28 This is suggested by the commentary to the NYSE listing standards (see NYSE Listed Company Manual §303A.07(b)(iii)(F)) and appears to be a best practice that can enhance the auditors’ review of the committee’s effectiveness under PCAOB standards.

29 Regulation S-K Item 407 requires the audit committee report in the proxy statement to disclose whether this occurred.

30 Item 407 of Regulation S-K describes the report of the committee that must be included in the annual meeting proxy statement. Item 9(e) of Schedule 14A also requires information relating to audit committee matters. On July 1, 2015, the SEC published a concept release seeking public
Quarterly financial reporting

As often and to the extent the committee deems necessary or appropriate but at least quarterly in connection with the review of each fiscal quarter’s financial statements, the committee will:

1. **Quarterly review.** Meet to review and discuss the quarterly financial statements of the company and the results of the independent auditors’ review of these financial statements with appropriate members of management and the independent auditors.

2. **Discussion of significant matters with management.** Meet to review and discuss with company management and, if appropriate, the independent auditors, significant matters relating to:

   - the quality and acceptability of the accounting principles applied in the financial statements;
   - new or changed accounting policies, and significant estimates, judgments, uncertainties or unusual transactions;

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comment on current audit committee disclosure requirements, focusing on the committee’s oversight of the independent registered public accounting firm. The comment period closed on September 8, 2015. Comments received can be found at [http://www.sec.gov/comments/s7-13-15/s71315.shtml](http://www.sec.gov/comments/s7-13-15/s71315.shtml). Companies should monitor this area for continuing developments and potential changes to disclosure requirements in the future.

31 NYSE Listed Company Manual §303A.07(b)(ii)(B) requires quarterly review by the committee. This is also implicit in NASDAQ Marketplace Rule 5605(c)(1)(C), which requires the committee to oversee the company’s accounting and financial reporting processes and the audits of the company’s financial statements.

32 For updated guidance from the SEC in preparing disclosures for quarterly reports, see our Checklist for Preparing Form 10-Q.

33 See footnote 14 above discussing PCAOB standards AS16 and AS18. We recommend that the company and committee discuss these standards with their auditor in preparing interim financial information.
• the selection, application and effects of critical accounting policies and estimates applied by the company; and

• any off-balance sheet transactions and relationships with any unconsolidated entities or any other persons that may have a material current or future effect on the financial condition or results of the company and are required to be reported under SEC rules.

3. MD&A. Meet to review and discuss with appropriate members of management and the independent auditors the specific intended disclosures under “Management’s Discussion and Analysis of Financial Condition and Results of Operations” to be included in the company’s quarterly report on Form 10-Q.\(^\text{34}\)

**Other duties and responsibilities**

*Annual review of this charter.* The committee will review and assess the adequacy of this charter annually and recommend any proposed changes to the full board.\(^\text{35}\)

*Annual review of performance.* The committee will evaluate its performance as the audit committee on an annual basis and report the results thereof to the full board of directors.\(^\text{36}\)

*Earnings releases and other financial guidance.* The committee will discuss with management earnings press releases and other published financial information or guidance provided to analysts and rating agencies. This may be conducted generally as to types of information

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\(^{35}\) NASDAQ requires annual review of the charter and the filing of an annual certification by the company with respect to the annual review.

\(^{36}\) Required only by NYSE Listed Company Manual §303A.07(b)(ii).
and presentations, and need not include advance review of each release, other information or guidance.\textsuperscript{37}

\textit{Compliance.} The committee, to the extent it deems necessary or appropriate, will periodically review with management the company’s disclosure controls and procedures, internal control over financial reporting, internal accounting controls and policies, systems and procedures to promote compliance with laws.\textsuperscript{38}

\textit{Risk oversight.}\textsuperscript{39} The committee will periodically:

- review risks relating to the financial statements, auditing and financial reporting process, [cybersecurity,] key credit risks, liquidity risks and market risks and inquire of management, the members of the internal audit department and the independent auditors about the company’s major financial and auditing risks or exposures;

- discuss the steps management has taken to monitor and control such exposures;

- discuss guidelines and policies with respect to risk management; and

\textsuperscript{37} Required only by NYSE Listed Company Manual §303A.07(b)(iii)(C).

\textsuperscript{38} NYSE Listed Company Manual § 303A.07(b)(i)(A)(2) requires the committee’s purposes to include oversight of legal and regulatory compliance. The remainder of these compliance items are not required specifically by any rule and should be reviewed carefully in light of any mechanism already in place for the oversight of disclosure controls and procedures or internal control over financial reporting.

\textsuperscript{39} An important aspect of audit committee oversight involves an understanding of the company’s significant financial and auditing risks. We recommend that the audit committee periodically review the risks relating to the company’s financial statements and financial reporting processes and discuss steps to continue to improve its oversight of the company’s risks. It is also important for audit committees to understand the link between risk and compensation policies and practices and to monitor new compensation-related disclosures under the Dodd-Frank Act. With the recent increases in cyber incidents and increased risks associated with cybersecurity, companies are focusing on maintaining robust cybersecurity programs. The board may want to consider delegating oversight of cybersecurity risk to the audit committee if the committee is already responsible for oversight of risk management for the company.
• report the results of such review to the full board of directors.  

*Derivative transactions.* On an annual basis, the committee will review and approve the company’s decision to enter into swaps, including those that may not be subject to clearing and exchange trading and execution requirements in reliance on the “end-user exception” set forth in Sections 2(h)(1) and 2(h)(8) of the Commodity Exchange Act (the “End-user Exception”), and the company will consider the risks and benefits of entering into swaps without clearing and exchange trading and execution in reliance on the End-user Exception. The committee will also review and approve the company’s policies governing the company’s use of swaps and other derivative transactions subject to the End-user Exception.  

*Conduct codes.* The committee will conduct any activities relating to the company’s code(s) of conduct and ethics as may be delegated from time to time to the committee by the board.  

*Complaints and anonymous submissions.* The committee will establish and maintain procedures for:  

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40 Specifically required only by NYSE Listed Company Manual §303A.07(b)(iii)(D). In addition, the SEC’s proxy disclosure enhancement rules adopted in 2009 require companies to describe the board’s role in the oversight of risk. It is advisable to have risk oversight at the board level and risk oversight procedures at other committee levels. The process suggested here is not the only process that the board may adopt, and the directors should consider exactly how they would like to discharge their risk oversight obligations and document the process accordingly. This should be reviewed carefully for consistency with the company’s other corporate governance documents.  

41 The Dodd-Frank Act created a regulatory regime administered by the Commodity Futures Trading Commission pursuant to which derivatives transactions must be submitted for clearing to a derivatives clearing organization unless they satisfy the End-user Exception. The End-user Exception requires a company that files reports with the SEC to have the board of directors or an appropriate committee of the board set appropriate policies governing the company’s use of swaps subject to the End-User Exception and to review those policies at least annually. Include this provision if the board has delegated this responsibility to the audit committee.  

42 Not specifically required but useful if the codes indicate audit committee oversight.  

43 The audit committee should review the company’s whistleblower process and compliance program given the whistleblower bounty program adopted by the SEC under the Dodd-Frank
the receipt, retention and treatment of complaints received by the company regarding accounting, internal accounting controls or auditing matters; and

the confidential, anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters.\textsuperscript{44}

If the committee or the board so determines, the submission procedures may also include a method for interested parties to communicate directly with the board’s [presiding director] [lead independent director] or with the non-management directors as a group.\textsuperscript{45}

\textit{Internal audit.} The committee will monitor that the company maintains an internal audit function (which may be outsourced to a firm other than the company’s independent auditors).\textsuperscript{46} The committee will oversee the internal auditors (or other personnel responsible for the internal audit function), who will report directly to the committee.

\textit{Related party transactions.} It is the company’s policy that the company will not enter into transactions required to be disclosed under item 404 of the SEC’s Regulation S-K unless the committee or another independent body of the board reviews and approves or ratifies the transactions.\textsuperscript{47}

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\textsuperscript{44} Exchange Act Rule 10A-3(b)(3).

\textsuperscript{45} Expressly permitted by NYSE Listed Company Manual §303A.03, but it should be harmonized with existing corporate governance practices and guidelines.

\textsuperscript{46} NYSE Listed Company Manual §303A.07(c) requires the maintenance of an internal audit function. As of the date of these materials, NASDAQ does not require the maintenance of an internal audit function; see footnote 3 above for further discussion.

\textsuperscript{47} In 2007, NASDAQ amended conflict of interest rule 5630 (a-b)(formerly 4350(h)) which previously required audit committee approval of related party transactions. NYSE listing
**Internal control over financial reporting.** The committee will periodically discuss and review, as appropriate, with the internal auditor, management and the independent auditors:

- the design and effectiveness of the company’s internal control over financial reporting; and

- any significant deficiencies or material weaknesses in that internal control, any change that has materially affected or is reasonably likely to materially affect that internal control (including special steps adopted in light of such a deficiency or weakness), and any fraud (whether or not material) that involves management or other employees who have a significant role in that internal control, that have been reported to the committee.48

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48 The listing standards and SEC rules do not separately address the role of the audit committee in the oversight of internal control, although NYSE Listed Company Manual §303A.07(c) and related commentary require that the internal audit function provide management and the committee with periodic assessments of the system of internal control. However, the officer certifications for periodic reports contain a statement representing that all significant deficiencies and material weaknesses in internal control that may be material, and any fraud that involves management or other employees with internal control roles, must be disclosed to the audit committee. In addition, the PCAOB audit standards require the auditors to determine whether the audit committee effectively oversees internal control over financial reporting, as part of the auditor’s work to prepare the attestation report on management’s evaluation of internal control. For these and other reasons, we consider it advisable for the committee to exercise appropriate...
Reports from legal counsel. The committee will review and take appropriate action with respect to any reports to the committee from legal counsel for the company concerning any material violation of securities law or breach of fiduciary duty or similar violation by the company, its subsidiaries or any person acting on their behalf.49

Other reviews and functions. The committee, as it may consider appropriate, may consider and review with the full board of directors, company management, internal or outside legal counsel, the independent auditors or any other appropriate person any other topics relating to the purposes of the committee that may come to the committee’s attention. The committee will report to the full board of directors the major items covered at each of its meetings.50 The committee may perform any other activities consistent with this charter, the company’s corporate governance documents and applicable listing standards, laws and regulations as the committee or the board of directors considers appropriate.

Miscellaneous

Committee access and information. The committee is at all times authorized to have direct, independent and confidential access to the independent auditors and to the company’s other directors, management and personnel to carry out the committee’s purposes. The committee is authorized to conduct or authorize investigations into any matters relating to the purposes, duties or responsibilities of the committee.

Committee advisers and funding. As the committee deems necessary to carry out its duties, it is authorized to select, engage (including

49 This provision is intended to address that SEC attorney conduct rules in 17 CFR Part 205.
50 NYSE Listed Company Manual §303A.07(b)(iii)(H) requires regular reports to the board of directors.

oversight of the internal control function. Note: The Dodd-Frank Act permanently exempted non-accelerated filers from the auditor attestation requirements of Section 404(b) under the Sarbanes-Oxley Act of 2002.
approval of the fees and terms of engagement), oversee, terminate and obtain advice and assistance from outside legal, accounting or other advisers or consultants. The company will provide for appropriate funding, as determined by the committee, for payment of:

- compensation to the independent auditors for their audit and audit-related, review and attest services;
- compensation to any advisers engaged by the committee; and
- ordinary administrative expenses of the committee that are necessary or appropriate in carrying out its duties.51

The committee will have sole authority to approve the engagement of any such consultant or its affiliates for additional services to the company, including the purchase of any products from such consultant or its affiliates.

Committee Structure and Operations. The committee will fix its own rules of procedure and shall meet as provided by such rules or by resolution of the committee.

Reliance on others. Nothing in this charter is intended to preclude or impair the protection provided in Section 141(e) of the Delaware General Corporation Law for good faith reliance by members of the committee on reports or other information provided by others.52

51 Exchange Act Rule 10A-3(b)(4) and (5).
52 Make changes as necessary for companies that are not incorporated in Delaware.
Annotated Form of Corporate Governance Guidelines

This form of corporate governance guidelines is designed to comply with SEC rules on corporate governance,¹ NYSE listing standards² and director fiduciary duties under Delaware and other states’ corporate laws and reflects what we consider as best practice. When reviewing governance policies and committee charters, companies may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of their larger institutional stockholders, which are usually published and available on their websites.

This document is designed primarily for use by listed US domestic issuers that are not the types of entities that receive special treatment under the applicable SEC rules and exchange standards, such as controlled companies, smaller reporting companies, foreign private issuers or companies listing only preferred or debt securities. Although it may be a useful resource for other types of entities, including unlisted companies, it is not designed to be used as model guidelines for such entities. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual market’s listing standards, which this document does not address.

We recommend that companies review this form of corporate governance guidelines with our forms of committee charters and

¹ See Regulation S-K Item 407.
² NYSE Listed Company Manual §303A.09 requires that NYSE listed companies adopt and disclose corporate governance guidelines: http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F4%5F3%5F10&CIRestriction=guideline&manual=%2F lcm%2Fsections%2Flcm%2Dsections%2F. The NASDAQ Marketplace Rules do not expressly require this; however, we consider it best practice for corporate governance purposes for NASDAQ listed companies to adhere to NYSE corporate governance standards.
public company bylaws. Because corporate governance practices vary widely from company to company, these sample corporate governance guidelines will need to be customized as necessary.

This form of corporate governance guidelines is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.

Note: It is always recommended to monitor the latest SEC Compliance and Disclosure Interpretations related to corporate governance and disclosure available on the SEC’s website at http://www.sec.gov/divisions/corpfin/cfguidance.shtml.
CORPORATE GOVERNANCE GUIDELINES

OF

THE BOARD OF DIRECTORS

OF

[Adopted] [Amended and restated] as of _________, 20__

Introduction; role of the board

The board of directors has adopted these policies as a general framework to assist the board in carrying out its responsibility for the business and affairs of the company to be managed by or under the direction of the board. Typically, the board, on behalf of the company and its stockholders, oversees and provides general direction to the management of the company.

In addition to other board or committee responsibilities outlined herein, the responsibilities of the board include the following (some of which may be delegated to one or more committees by charter or board practice):

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1 The company’s articles, bylaws, committee charters, and other governance documents should be reviewed to ensure that these guidelines are consistent with each of those documents. The company may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services (“ISS”) and Glass Lewis as well as the proxy voting policies of its larger institutional stockholders, which are usually published and available on their websites.

• reviewing, monitoring and approving the overall operating, financial and strategic plans, operating goals and performance of the company;

• [selecting, evaluating and retaining the company’s senior executives;]

• together with the chief executive officer, reviewing the job performance of elected corporate officers and other senior executives on an annual basis;³

• [reviewing the outside activities of senior executives;]

• selecting, evaluating, retaining and compensating the company’s CEO, and providing oversight of the selection, evaluation, retention and compensation of the other executive officers;⁴

• overseeing appropriate policies of corporate conduct and compliance with laws;

• to periodically assess the effectiveness of policies to facilitate communication between the company’s stockholders and directors;

³ The company’s compensation committee may have this role; ensure that this provision corresponds to the role of the compensation committee as set forth in the compensation committee charter.

⁴ The company’s compensation committee may have the role of determining the CEO and executive officers’ compensation. Ensure that this provision corresponds to the role of the compensation committee as set forth in the compensation committee charter. See NYSE Listed Company Manual §303A.05(b)(i)(A)-(B) and NASDAQ Marketplace Rule 5605(d)(1)(B). Both sets of listing rules require that the compensation committee, or a majority of independent directors, make recommendations as to non-CEO executive officer compensation, and the NASDAQ Marketplace Rules state that the compensation committee may determine such compensation. The commentary to NYSE Listed Company Manual §303A.05 provides that the board is not precluded from delegating its authority over non-CEO compensation matters to the compensation committee.
• reviewing the major risks facing the company and helping develop strategies to address these risks;\(^5\)

• implementing and overseeing the operation of reasonable information and reporting systems or controls designed to inform of material risks;\(^6\)

• to discuss and be apprised of the company’s position on issues related to corporate social responsibility, public policy and philanthropy;

• reviewing the process by which financial and non-financial information about the company is provided to management, the board and the company’s stockholders; and

• establishing policies designed to maintain the financial, legal and ethical integrity of the company.

The company’s senior executives, under the direction of the CEO, are responsible for the operations of the company, implementation of the strategic, financial, and management policies of the company, identifying, assessing and managing risk and risk mitigation strategies, preparation of financial statements and other reports that accurately reflect requisite information about the company, and timely reports which inform the board about the foregoing matters.

These policies are not intended as binding legal obligations or inflexible requirements, and are not intended to interpret applicable laws and regulations or modify the company’s [articles] [certificate] of incorporation or bylaws.

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\(^5\) Due to the SEC’s emphasis on risk assessment disclosures and disclosure requirements about the board’s involvement in risk oversight, we consider it best practice to expressly document a process of risk oversight by the board. See also “Director Responsibilities – Risk Oversight” herein stating that the board reserves oversight of the major risks facing the company and has delegated risk oversight responsibilities to appropriate committees.

\(^6\) See *Stone*, 911 A.2d 362.
Board composition

Size of the board. The board of directors will periodically review the appropriate size of the board [based on recommendations from the nominating and corporate governance committee]. The company’s bylaws currently provide that the authorized number of directors [is ___] [will be not less than ___ nor more than ___]. [Each member of the board is subject to election annually by the stockholders.] The board is classified with the terms of office of each of the [two] [three] classes of directors ending in successive years of [2] [3] year terms, as provided in the company’s [articles] [certificate] of incorporation.

Majority of independent directors. A majority of the directors serving on the board will meet the standards for director independence set forth in the [NASDAQ] [NYSE] listing standards as the same may be amended from time to time (the “listing standards”), as well as other factors not inconsistent with the listing standards that the board considers appropriate for effective oversight and decision-making by the board.

Affirmative determination of independence. The board will affirmatively determine annually and at other times required by the

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7 Our form of nominating and corporate governance committee charter provides that such committee will make recommendations to the board regarding the composition and size of the board; ensure consistency.
8 Ensure consistency with the company’s charter and bylaws.
9 NASDAQ Marketplace Rule 5605(b)(1) provides that a majority of the board of directors must be comprised of independent directors as defined in Rule 5605(a)(2). NYSE Listed Company Manual §303A.01 provides that listed companies must have a majority of independent directors. The NYSE independence tests are set forth in the NYSE Listed Company Manual §303A.02. NYSE and NASDAQ listed companies must comply with the disclosure requirements set forth in Item 407(a) of Regulation S-K that requires identification of independent directors in the annual proxy statement and Form 10-K.
10 On October 2, 2015, the Delaware Supreme Court held in Del. Cnty. Emp. Ret. Fund, et al. v. Sanchez, et al., 2015 WL 5766264 (Del. Oct. 2, 2015) that a director’s personal and business relationships with an interested party must be reviewed in their totality when considering a director’s independence, and that a long-term friendship carries a greater inference of compromise of independence than do more superficial relationships. Although the tests for independence under Delaware law as compared to those under the NYSE and NASDAQ listing
listing standards that the directors designated as independent have no material relationships to the company (either directly or with an organization in which the director is a partner, stockholder or officer or is financially interested) that may interfere with the exercise of their independence from management and the company. Directors serving on certain board committees may be required to meet additional requirements as specified in the charter for that committee.

**Board membership criteria.** The board’s policy is to encourage selection of directors who will contribute to the company’s overall corporate goals of [tailor to company’s corporate goals: responsibility to its stockholders, industry leadership, customer success, positive working environment, and integrity in financial reporting and business conduct]. The board and the nominating and corporate governance committee will from time to time review the experience and characteristics appropriate for board members and director candidates in light of the board’s composition at the time and skills and expertise needed for effective operation of the board and its committees.

[Basic requirements for membership on the board may include the following:]

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11 NASDAQ Marketplace Rule 5605(b)(1) provides that a company must disclose in its annual proxy statement (and Form 10-K) those directors that the board of directors has determined to be independent under Rule 5605(a)(2). NYSE Listed Company Manual §303A.02(a) provides that no director qualifies as “independent” unless the board of directors affirmatively determines that the director has no material relationship with the listed company. Item 407(a)(3) of Regulation S-K requires that for each director and nominee for director that is identified as independent, the company will disclose in its annual proxy statement and Form 10-K, and describe by category or type, any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) of Regulation S-K that were considered by the board in determining that the director is independent.

12 Our form of nominating and corporate governance committee charter provides certain criteria for consideration when nominating and appointing directors; ensure these membership requirements are consistent with those contained in the company’s nominating and corporate governance committee charter, if any.
Ethics: Directors should be persons of good reputation and character who conduct themselves in accordance with high personal and professional ethical standards, including the policies set forth in the company’s code of conduct.

Business and professional activities: Directors should maintain a professional life active enough to keep them in contact with the markets, the business and technical environments and the communities in which the company is active. Because this exposure is a main factor in selecting and retaining directors, a significant position or title change will be seen as reason to review a director’s membership on the board.

Experience, qualifications and skills: Directors should have experience, qualifications and skills relevant for effective management and oversight of the company’s senior executives, which could be acquired through education, training, experience, self-study or other means such as experience at senior executive levels in comparable companies, public service, professional service firms, educational institutions or other organizations.

Time: Directors should have the time and willingness to carry out their duties and responsibilities effectively, including time to study informational and background material and to prepare for meetings. Directors should attempt to arrange their schedules to allow them to attend all scheduled board and committee meetings.

Diversity: The board believes that diversity, including differences in backgrounds, qualifications, and personal characteristics, is important to the effectiveness of the board’s oversight of the company.13

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13 Under the SEC proxy disclosure rules, companies must disclose (i) whether, and if so, how, a nominating committee considers diversity in identifying nominees for director; and (ii) if the nominating committee has a policy with regard to the consideration of diversity in identifying director nominees, how the policy is implemented. Companies are not required to consider diversity in identifying nominees for director; however, if the company chooses to so consider diversity, documenting it in these guidelines would provide support for the conforming annual
Conflicts of interest: Each director should not, by reason of any other position, activity or relationship, be subject to any conflict of interest that would impair the director’s ability to fulfill the responsibilities of a member of the board.]

[Director membership on other corporate boards. Directors may not serve on more than [xx] public company boards, subject to waiver by the nominating and corporate governance committee but in no event will a director serve on more than six public company boards. A director who serves as a CEO may not sit on more than three public company boards. A director may not serve as a member of the audit committee of more than two other public companies unless the board determines that such simultaneous service will not impair the ability of such director to effectively serve on the audit committee, and this determination is disclosed in the company’s annual proxy statement. A director should advise the [Chairperson of the board] in advance of accepting an invitation to serve on another company’s board.]

Selection, tenure and retirement of board members

Selection of board nominees. [The board has overall responsibility for the selection of candidates for nomination or appointment to the board, provided that nominees for election by the stockholders and

proxy statement disclosure.

14 Consider including this section as a best practice; see footnotes 15 through 18 for further discussion.

15 ISS US Proxy Voting Summary Guidelines as of the date of these materials provide that a director is considered to be “overboarded” if he/she serves on more than six public company boards. ISS will recommend a vote AGAINST or to WITHHOLD for such nominees. Additionally, in its 2015-2016 Global Policy Survey, ISS sought input on director overboarding. See further discussion of ISS policy available at http://www.issgovernance.com/policy.

16 ISS currently considers a CEO of a public company who sits on more than two public company boards besides his/her own as overboarded as well; see footnote 15 above.

17 This language mirrors the requirement under NYSE Listed Company Manual §303A.07 for audit committee requirements.

18 Consider the appropriate person for notification based on the company’s preference/governing documents. Some company’s have directors notify the chair of the nominating and corporate governance committee instead.
appointees to fill board vacancies will be approved by a majority of the independent directors. The nominating and corporate governance committee will recommend director candidates to the board for nomination or appointment.] [The nominating and corporate governance committee will determine the individuals to be nominated to serve on the company’s board of directors for election by stockholders at each annual meeting of stockholders, and to be appointed to fill vacancies on the board of directors, [subject to approval by the board of directors which will include approval by a majority of the independent directors and] subject to legal rights, if any, of third parties to nominate or appoint directors.]

[Election of directors.]20 The bylaws of the company provide for a majority voting standard in an uncontested election of directors. In such uncontested elections, directors are elected by a majority of the votes cast, which means that the number of shares voted “for” a director must exceed the number of shares voted “against” that director. Any incumbent director who fails to receive the required number of votes for re-election shall promptly submit his or her resignation, and the nominating and corporate governance committee will make a recommendation to the board on whether to accept or reject the resignation, or whether other action should be taken. In determining whether or not to recommend that the board accept any resignation offer, the nominating and corporate governance committee shall be entitled to consider all factors believed relevant by such committee’s members. The board will act on the nominating and corporate governance committee’s recommendation within ninety (90) days following certification of the election results. Any director whose resignation is under consideration will not participate in the

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19 Review the nominating and corporate governance committee charter to see if this is addressed and conform to the charter.

20 Consider including this section as a best practice. Most companies have moved to a majority vote standard for uncontested elections with a plurality standard maintained for contested elections. Review the company’s articles, bylaws and other governing documents to ensure this provision is consistent and consider tailoring the provision further to be in line with the terminology used in such governing documents.
Annotated Form of Corporate Governance Guidelines

nominating and corporate governance committee deliberations and will recuse himself or herself from the board vote. The board will promptly publicly disclose its decision regarding the director’s resignation offer. If the board accepts a director’s resignation pursuant to this process, the nominating and corporate governance committee shall recommend to the board whether to fill such vacancy or reduce the size of the board.

If each member of the nominating and corporate governance committee fails to receive the required vote in favor of his or her election, then those independent directors who did receive the required vote will appoint a committee among themselves to consider the resignation offers and make a recommendation to the board. If each independent director fails to receive the required vote in favor of his or her election, then all directors may participate in the action regarding whether to accept the resignation offers.

In contested elections, directors are elected by a plurality of the votes of the shares represented in person or by proxy at the meeting and entitled to vote on the election of directors.

Length of board service.21 The board, based on recommendations by the nominating and corporate governance committee, will review each director’s continuation on the board every year. This review will include determination of independence as well as consideration of

21 Since the 2014 proxy season, director tenure has been a topic of interest. ISS includes director tenure as one of its governance factors to be considered when calculating a company’s QuickScore. ISS commentary notes that limiting director tenure allows new directors to the board to bring fresh perspectives and that a tenure of more than nine years is considered to potentially compromise a director’s independence and as such, QuickScore will consider non-executive directors where tenure is greater than nine years. Additionally, in its policy survey outreach for 2013-2014, ISS identified director tenure in its survey questions, indicating that it could become the subject of a new ISS voting policy in an upcoming proxy season. ISS did not include director tenure in its 2015-2016 policy survey outreach. ISS voting guidelines currently provide for voting AGAINST management and shareholder proposals to limit the tenure of outside directors through mandatory retirement ages; however, the policy goes on to state that boards where the average tenure of all directors exceeds 15 years should be scrutinized. The significance of director tenure will be influenced by whether ISS adopts a specific voting policy in this area and companies should continue to monitor this development.
skills, experience, number of other public and private company boards on which the individual serves, composition of the board at that time, and other criteria in the context of the needs of the company [and the membership requirements described above.]

Change in status of board members. The board does not believe that directors who retire from or change their principal occupation or business should necessarily be required to end their service as directors. However, both independent and management directors who retire from or change their principal occupation or business [or an independent director who accepts or intends to accept a directorship with another company that he or she did not hold when most recently elected to the board]22 will offer to resign their service as a director, which offer may then be evaluated by the board [or the nominating and corporate governance committee]23 in light of the individual circumstances.

Retirement. [The board does not believe that there should be a fixed term21 or retirement age for directors.]24 [It is the policy of the company that an independent director shall not serve as a director beyond the end of an elected term during which the director achieves his or her [70th]24 birthday, provided that the full board may unanimously re-nominate a candidate over [70] years of age for another elected term due to special circumstances based on a director’s particular contributions and expertise.]

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22 Bracketed portion addresses additional directorships of independent directors, since a new directorship could also create conflicts of interest with the company or possibly a loss of an individual’s status as an independent director.

23 Our form of nominating and corporate governance committee charter provides that the committee will review any such changes and make a recommendation to the board concerning such matters.

24 There is no requirement for mandatory retirement at a specific age for directors. If a company includes a retirement provision, the age for retirement typically ranges from 70-75 years old, with an increased percentage of companies more recently raising the retirement age to 75 years old.
Succession planning. The nominating and corporate governance committee shall have the primary responsibility for developing a succession plan for the board and making recommendations to the full board on director succession matters. In so doing, the nominating and corporate governance committee will determine the appropriate and desirable mix of characteristics, skills, expertise, diversity and experience for the full board and each of its committees, taking into account the qualifications of both existing directors and opportunities to nominate others for election.

Board leadership

Management directors. The board anticipates that the company’s CEO will be nominated annually to serve on the board. The board may also appoint or nominate other members of the company’s management whose experience and role at the company are expected to help the board fulfill its responsibilities.

Board and committee meetings. All meetings of and other actions by the board and its committees shall be held and taken pursuant to the bylaws of the company, including provisions governing notice of meetings and waiver thereof, the number of board members required to take actions at meetings and by written consent, and other related matters.

Agenda. The Chairperson of the board will have primary responsibility for establishing the agenda for each meeting and arranging for the agenda to be sent in advance of the meeting to the directors along with appropriate written information and background materials. Each board committee, and each individual director, is encouraged to suggest items for inclusion on the agenda. [Agenda items that fall within the scope of responsibilities of a board

25 Bylaws usually address board and committee’s procedures. Consider including a reference to the pertinent section of the company’s bylaws.

26 See footnote 28 below regarding the “lead independent director” role; this section may need to be revised, depending on responsibilities given to a lead independent director.
committee will be reviewed with the chairperson of that committee.

The Chairperson and the full board separately have authority to require the board to meet in executive sessions outside the presence of management to discuss sensitive matters with or without distribution of written materials.

Meetings of independent directors. Independent directors will meet on a regularly scheduled basis in executive sessions without the CEO or other members of the company’s management present.²⁷

Chairperson and presiding independent director.²⁸ The board will periodically appoint a Chairperson of the board. Both independent and management directors, including the CEO, are eligible for appointment as the Chairperson. If the Chairperson is not an independent director, the board will either designate an independent director to preside at the meetings of independent directors or a procedure by which a presiding director is selected for these meetings.²⁹ The company will appropriately disclose the name of this

²⁷ NYSE Listed Company Manual §303A.03 requires that the non-management directors meet at regularly scheduled executive sessions without management. NASDAQ Marketplace Rule 5605(b)(2) requires that independent directors have regularly scheduled meetings at which only independent directors are present.

²⁸ Review the company’s bylaws to see if this is addressed and conform to bylaws. Also, with recent heightened attention to separating the roles of Chairman and CEO and enhanced SEC disclosure requirements regarding board leadership structure, a company may want to consider strengthening the “presiding director” role to a “lead independent director” role and adopting a lead independent director policy. Replacement language might be:

“Chairperson and lead independent director. The board will periodically appoint a Chairperson of the board. Both independent and management directors, including the CEO, are eligible for appointment as the Chairperson. If the Chairperson is not an independent director, the board considers it to be useful and appropriate to designate an independent director to serve in a lead capacity to coordinate the activities of the other independent directors and to perform such other duties and responsibilities as the board may determine. The lead independent director will be elected by a majority of the independent directors of the board for a renewable one-year term. Such term shall generally commence at the first board meeting after the annual meeting of stockholders and end immediately prior to the next annual meeting of stockholders. The company’s lead independent director policy is [included as Exhibit A hereto] [set forth on the company’s website]. The company will appropriately disclose the name of the lead independent director and the method by which all interested parties may contact the independent directors.”

²⁹ Under the SEC’s proxy disclosure requirements, a company is required to provide information
presiding director and the method by which all interested parties may contact the independent directors.\textsuperscript{30}

\textit{Annual review.} The board will conduct an annual assessment of its leadership structure to determine that the leadership structure is the most appropriate for the company.\textsuperscript{31}

**Board compensation and stock ownership guidelines**

\textit{Compensation.} The compensation committee will recommend to the board of directors compensation programs for independent directors, [the lead independent director,]\textsuperscript{32} committee chairpersons, and committee members, consistent with any applicable requirements of the listing standards for independent directors and including consideration of cash and equity components of this compensation. The board will determine the form and amount of independent director compensation.\textsuperscript{33}

\textsuperscript{30} These are NYSE requirements; NASDAQ does not require this disclosure. NYSE Listed Company Manual §303A.03 provides that if one director is chosen to preside at all of the executive sessions of independent directors, his or her name must be disclosed either on or through the listed company’s website or in its annual proxy statement or in its annual report on Form 10-K filed with the SEC. Alternatively, if the same individual is not the presiding director at every meeting, a listed company must disclose the procedure by which a presiding director is selected for each executive session.

\textsuperscript{31} We consider it best practice to include an annual assessment of the chosen board leadership structure in the guidelines to have a clear understanding as to why the company believes the structure is appropriate at the time it files its annual proxy statement and annual report on Form 10-K.

\textsuperscript{32} If a lead independent director role is established, include such position in the list of compensation programs to be considered.

\textsuperscript{33} Considered a best practice. Ensure this is consistent with the compensation committee charter.
[Stock Ownership Guidelines.\textsuperscript{34} The board believes that it is important to align the interests of the board with the interests of the stockholders and, therefore, for each director to hold a meaningful equity position in the company. Currently, each independent director is expected to beneficially own stock in the company in an amount equal to [____] times the current annual cash retainer within five years of such director’s election to the board.]

Board committees

Committees. The committees of the board are the audit committee, compensation committee, and the nominating and corporate governance committee. [List other committees, if any.] The board may, from time to time establish additional committees.\textsuperscript{35}

Committee member selection. [After considering the recommendations of the nominating and corporate governance committee,] the board will designate the members and the chairperson of each committee, endeavoring to match the committee’s function and needs for expertise with individual skills and experience of the appointees to the committee. Each member of the audit, compensation\textsuperscript{36} and nominating and corporate governance committees will be independent as defined in the applicable listing standards, laws and regulations.

Committee functions. Each of the audit, compensation and nominating and corporate governance committees will have a written charter approved by the board in compliance with applicable listing standards,

\textsuperscript{34} Consider including as a best practice if the company’s board has stock ownership guidelines. If the company also has executive officer stock ownership guidelines, you may want to include disclosure in the corporate governance guidelines as a best practice.

\textsuperscript{35} Under NYSE listing standards, companies must have these 3 committees; NASDAQ listing standards require an audit committee and a compensation committee; a majority of independent directors may determine, or recommend to the full board for determination, nominations for board membership.

\textsuperscript{36} The NYSE and NASDAQ listing standards adopted in January 2013 (as subsequently amended with respect to NASDAQ on November 26, 2013) require enhanced independence standards for members of the compensation committee. See our forms of compensation committee charter for further discussion and analysis.
laws and regulations. The number and content of committee meetings and means of carrying out committee responsibilities will be determined by each committee in light of the committee’s charter, the authority delegated by the board to the committee, and legal, regulatory, accounting and governance principles applicable to that committee’s function. The company will afford access to the company’s employees, professional advisers, and other resources, if needed, to enable committee members to carry out their responsibilities.

**Audit Committee financial expert/financial literacy.** The audit committee should have one member that qualifies as an “audit committee financial expert” as defined by applicable rules of the SEC under Section 407 of the Sarbanes Oxley Act and all members should be “financially literate” in accordance with the listing standards. The board shall be responsible for determining the qualification of an individual to serve on the audit committee as a designated “audit committee financial expert” and whether such person is “financially literate.” In light of this responsibility of the board, the nominating and corporate governance committee shall coordinate closely with the board in screening any new candidate and in evaluating whether to renominate any existing director who may serve in this capacity.

**Director responsibilities**

**General responsibilities.** A director is expected to discharge his or her director duties, including duties as a member of a committee on which the director serves, in good faith and in a manner the director reasonably believes to be in the best interests of the company.

**Disclose relationships.** Each independent director is expected to disclose promptly to the board any existing or proposed relationships

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37 See Item 407(d)(5) of Regulation S-K for the definition of “audit committee financial expert.” See also NYSE Listed Company Manual §303A.07(a) and related commentary and NASDAQ Marketplace Rule 5605(c)(2)(A) and related interpretive materials for the definition of “financially literate” and the exchanges’ further views on “audit committee financial expert.”
with the company (other than service as a board member or on board committees) which could affect the independence of the director under applicable listing standards or any additional standards as may be established by the board of directors from time to time, including direct relationships between the company and the director and his or her family members, and indirect relationships between the company and any business, nonprofit or other organization in which the director is a general partner or manager, officer, or significant stockholder, or is materially financially interested.

**Confidentiality.** Directors have an obligation to protect and keep confidential all non-public information related to the company (the “confidential information”) unless and until the board has authorized disclosure (or unless otherwise required by law or regulation). Confidential information includes all non-public information entrusted to or obtained by a director by reason of his or her position on the board, such as information regarding the strategy, business, finances and operations of the company, minutes, reports and materials of the board and its committees, and other documents identified as confidential by the company, including but not limited to non-public information concerning: (1) the company’s financial condition, prospects or plans, its marketing and sales programs and research and development information, as well as information relating to acquisitions, divestitures and actions relating to the company’s stock; (2) possible transactions with other companies or information about the company’s suppliers, licensors or joint venture partners, which the company is under an obligation to maintain as confidential; and (3) the proceedings and deliberations of the board and its committees, and the discussions and decisions between and among employees, officers and directors.

Directors may not use confidential information for personal benefit or to benefit other persons or entities other than the company. Directors should refrain from disclosing confidential information without the authorization of the board or the Chairperson, unless otherwise
required by law or regulation. The obligations described above continue even after service on the board has ended.\textsuperscript{38}

\textit{Reporting and compliance systems}. Based on information available to the director, each director should be satisfied that company management maintains an effective system for timely reporting to the board or appropriate board committees on the following: (1) the company’s financial and business plans, strategies and objectives; (2) the recent financial results and condition of the company and its business segments; (3) significant accounting, regulatory, competitive, litigation and other external issues affecting the company; and (4) systems of control which promote accurate and timely reporting of financial information to stockholders and compliance with laws and corporate policies. Each director is expected to have a basic understanding of the foregoing matters to the extent information is furnished by management or otherwise available to the board.

\textit{Attendance}. Board members are expected to devote sufficient time and attention to prepare for, attend and participate in board meetings and meetings of committees on which they serve, including advance review of meeting materials that may be circulated prior to each meeting. [Board members are expected to attend the annual stockholders’ meeting absent special circumstances.\textsuperscript{39}]

\textit{Access to information}. The company’s management will afford each board member access to the company employees and the outside

\textsuperscript{38} Increased stockholder activism, including heightened stockholder engagement and influence, has increased the pressure to share information with stockholders as well as the likelihood of informational conflicts involving activist-designated directors. Generally, it is accepted under Delaware law that a director’s duty of confidentiality is within the scope of his or her duty of loyalty; however, the exact scope of the duty of confidentiality and what constitutes confidential information has not been clearly addressed. The company may wish to include this provision to help protect confidential information and deliberations that occur within the boardroom.

\textsuperscript{39} Item 407(b) of Regulation S-K requires that companies name each incumbent director who, during the last fiscal year attended fewer than 75\% of the aggregate of the board meetings and the meetings of a committee on which he or she served. This item also requires disclosure of whether or not the company has a policy governing directors’ attendance at stockholder meetings. Include bracketed language if the company has such a policy.
auditors, legal counsel and other professional advisers for any purpose reasonably related to the board’s responsibilities. Each director is entitled to inspect the company’s books and records and obtain such other data and information as the director may reasonably request; inspect facilities as reasonably appropriate for the performance of director duties; and to receive notice of all meetings in which a director is entitled to participate and copies of all board and committee meeting minutes.

**Independent inquiries and advisers.** The board is authorized to conduct investigations, and to retain, at the expense of the company, outside legal, accounting, investment banking, or other professional advisers for any matters relating to the responsibilities of the board. Each of the board’s standing committees has similar authority to retain outside advisers as each determines appropriate, as set forth in the respective committee’s charter.

**Reliance on information.** In discharging responsibilities as a director, a director is entitled to rely in good faith on reports or other information provided by company management, independent auditors, and other persons as to matters the director reasonably believes to be within such other person’s professional or expert competence and who has been selected with reasonable care by or on behalf of the company.

**Transactions affecting director independence.** Without the prior approval of a majority of disinterested members of the full board, and, if required by the listing standards, the audit committee, the company will not make significant charitable contributions to organizations in which a director or a family member of the director is affiliated, enter into consulting contracts with (or otherwise provide indirect forms of compensation to) a director, or [review next clause in light of listing standards:] enter into any relationships or transactions (other than service as a director and board committee member) between the company and the director (or any business or nonprofit entity or organization in which the director is a general partner, controlling stockholder, officer, manager, or trustee, or materially financially
interested). Notwithstanding the foregoing, to the extent required to comply with SEC rules, no member of the audit committee will be an affiliated person of the company or receive any direct or indirect compensation from the company other than for service as a director and on committees on which the individual serves, \(^{40}\) and each such member will otherwise meet the independence requirements set forth in the audit committee charter. Additionally, all members of the compensation committee must meet the independence requirements for committee membership as determined by applicable SEC rules and listing standards and as set forth in the compensation committee charter. \(^{41}\)

**Continuing education.** The board is expected periodically to review the company’s policies and procedures for providing orientation sessions for newly elected or appointed directors and to recommend, on an as-needed basis, continuing director education programs for board or committee members.

**Annual evaluation.** The board, in conjunction with the nominating and corporate governance committee, will evaluate these corporate governance guidelines and whether the board and its committees are functioning effectively at least annually.

**Risk oversight.** The board should understand the principal risks associated with the company’s business on an on-going basis and it is the responsibility of management to assure that the board and its committees are kept well informed of these changing risks on a timely basis. It is important that the board oversee the key risk decisions of management, which includes comprehending the appropriate balance between risks and rewards. [The board reserves oversight of the major risks facing the company and has delegated risk oversight responsibility to the appropriate committees in the following areas: the

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\(^{40}\) Derived from Exchange Act Rule 10A-3 requirements.

\(^{41}\) Derived from NYSE and NASDAQ listing standards for independence of compensation committee members; see NYSE Listed Company Manual §303A.02 and NASDAQ Marketplace Rule 5605(d)(2).
audit committee oversees risks relating to financial matters, financial reporting and auditing [and cybersecurity]\(^{42}\) and the compensation committee oversees risks relating to the design and implementation of the company’s compensation policies and procedures.]\(^{43}\)

### Management responsibilities

**Management succession planning.** At least annually, the compensation committee will consider and assist the board in developing succession plans for the CEO and other key executive officers and appropriate management personnel.\(^ {44}\) The board may from time to time ask the compensation committee to undertake other specific reviews concerning management succession planning. The CEO also reviews management succession and development plans for executive officers with the board.

**Financial reporting and legal compliance.** The board’s governance and oversight functions do not relieve the primary responsibilities of the company’s management to (1) make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company;\(^ {45}\) (2) devise and maintain an effective system of internal accounting controls;\(^ {46}\)

\(^{42}\) With the recent increases in cyber incidents and increased risks associated with cybersecurity, companies are focusing on maintaining robust cybersecurity programs. The board may want to consider delegating oversight of cybersecurity risk to the audit committee.

\(^{43}\) These two risk oversight functions are suggested in response to the SEC’s proxy disclosure regulations providing for enhanced disclosure obligations for the board’s role in risk oversight and the assessment of the company’s compensation policies and practices as they relate to risk-taking. Some public companies divide the risk oversight function into different categories, such as Strategic Risk, Compliance and Litigation Risk, Cybersecurity Risk, Operational Risk, Reputational Risk and Financial and Auditing Risk, and assign each category to a different committee. Companies may define categories of risk differently.

\(^{44}\) Consistent with provisions in our forms of compensation committee charter.

\(^{45}\) See Exchange Act Section 13(b)(2)(A), which is the Foreign Corrupt Practices Act (“FCPA”) books and records requirement. It is not required to be recited in the corporate governance guidelines but considered a good practice for easy reference and a reminder of the standard in light of increased Department of Justice (DOJ) and SEC enforcement actions.

\(^{46}\) See Exchange Act Section 13(b)(2)(B), which is the FCPA internal accounting controls requirement. It is not required to be recited in the corporate governance guidelines but
(3) devise and maintain effective disclosure controls and procedures and internal control over financial reporting; 47 (4) prepare financial statements that are accurate and complete and fairly present the financial condition, results of operation and cash flows of the company; and (5) devise and maintain systems, procedures and corporate culture which promote compliance with legal and regulatory requirements and the ethical conduct of the company’s business. 48

**Corporate communications.** Executive management has the primary responsibility to establish policies concerning the company’s communications with investors, the press, customers, suppliers and employees.

**Communication of corporate governance guidelines.** As required by the listing standards, management will assure that the company’s website will include a copy of these guidelines, copies of the charters of the audit, compensation, and nominating and corporate governance committees and, if applicable, other key committees of the board, and a copy of the company’s code of business conduct and ethics. Management will also include in the company’s annual report to stockholders statements to the effect that this information is available on the company’s website and in print to any stockholder who requests it.

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47 See SEC Rule 13a-15(f) and Items 307 and 308 of Regulation S-K. This is a paraphrase of the disclosure controls and procedures and internal control over financial reporting standards, which are not required to be recited in the Corporate Governance Guidelines but considered a good practice for easy reference and a reminder of the standard.

48 US federal sentencing guidelines provide for reduced potential penalties if a company can demonstrate that it has an effective compliance program to prevent and detect criminal conduct.
Annotated Form of Nominating and Corporate Governance Committee Charter

This form of nominating and corporate governance committee charter is designed to comply with SEC rules on corporate governance and director qualifications\(^1\) and NYSE and NASDAQ listing standards\(^2\) and reflects what we consider as best practice. When reviewing committee charters and other governance policies, companies may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of their larger institutional stockholders, which are usually published and available on their websites.

This document is designed primarily for use by listed US domestic issuers that are not the types of entities that receive special treatment under the applicable SEC rules and exchange standards, such as controlled companies, smaller reporting companies, foreign private issuers or companies listing only preferred or debt securities. Although it may be a useful resource for other types of entities, including unlisted companies, it is not designed to be used as a model charter for such entities. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual market’s listing standards, which this document does not address.

We recommend that companies review this form of nominating and corporate governance committee charter together with our form of corporate governance guidelines and public company bylaws.

\(^1\) See Regulation S-K Item 407(c).
Because corporate governance guidelines and practices vary widely from company to company, this sample charter does not attempt to address all corporate governance functions that may be performed by the nominating and corporate governance committee. This sample charter will need to be customized as necessary to reflect the role in corporate governance activities that is assigned to the nominating and corporate governance committee. This form of committee charter does not contain any provisions regarding notice of meetings, procedure, quorum requirements or action by written consent as these matters are typically addressed in the bylaws. To the extent the bylaws do not contain such provisions, appropriate provisions should be included in the committee charter.

This form of nominating and corporate governance committee charter is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.

Note: It is always recommended to monitor the latest SEC Compliance and Disclosure Interpretations related to corporate governance and disclosure available on the SEC’s website at http://www.sec.gov/divisions/corpfin/cfguidance.shtml.
CHARTER

OF THE

NOMINATING AND CORPORATE GOVERNANCE COMMITTEE¹

OF

THE BOARD OF DIRECTORS

OF

_______________________

[Adopted] [Amended and restated] as of ________, 20__

Purposes

The primary purposes and responsibilities of the committee are to:²

• identify and [select] [recommend to the board for selection] the individuals qualified to serve on the company’s board of directors (consistent with criteria that the board has approved) for election

¹ The company’s articles, bylaws, equity compensation and other benefit plans, corporate governance guidelines, and other committee charters should be reviewed to ensure that this charter is consistent with each of those documents. The company may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of its larger institutional stockholders, which are usually published and available on their websites.

² All of these items are based on required “purposes and responsibilities” under the NYSE listing standards. See NYSE Listed Company Manual §303A.04. See footnote 3 below for NASDAQ requirements regarding director nominees; remaining items listed are considered best practice for NASDAQ listed companies.
by stockholders at each annual meeting of stockholders and fill
vacancies on the board of directors;³

• develop, recommend to the board, and assess corporate
governance policies for the company; and

• oversee the evaluation of the board."⁴

Composition

Membership. The committee must consist of at least [two]⁵ directors.

Independence. All committee members must have been determined by
the board to be independent as defined in the [NYSE] [NASDAQ]
listing standards, as they may be amended from time to time (the
“listing standards”) and must otherwise meet the requirements for
committee membership as determined by the listing standards.⁶

³ The committee can either select director candidates directly or recommend candidates to the
board for selection; see NYSE Listed Company Manual §303A.04(b)(i) and NASDAQ
Marketplace Rule 5605(e)(1). NASDAQ listing standards require that “[d]irector nominees must
either be selected, or recommended for the board’s selection,” by a nominations committee
comprised solely of independent directors or a majority of the board’s independent directors;
NYSE listing standards require a nominating committee to “select, or to recommend that the
board select” the nominees. Also, the NYSE, but not NASDAQ, listing standards require a board
committee of independent directors to advise on governance issues; the NYSE standards would
allow nominating and governance functions to be split into different committees. Review the
company’s governing documents to ensure the process used by the committee is consistent with
the requirements therein.

⁴ NYSE purposes for this committee also include oversight of the evaluation of management;
however, this form omits management evaluation, which is included in the companion form of
compensation committee charter. Under the NYSE rule commentary, “Boards may allocate the
responsibilities of the nominating/corporate governance committee to committees of their own
denomination, provided that the committees are composed entirely of independent directors. Any
such committee must have a committee charter.”

⁵ NYSE and NASDAQ listing standards do not specify a minimum number for membership.
NASDAQ standards would also allow director nominations to be made by a majority of the
independent directors on the board.

⁶ There are NASDAQ “exceptional and limited circumstances” exceptions for a single director
who is not independent under certain circumstances where the committee has at least three
members; see NASDAQ Marketplace Rule 5605(e)(3). However, as a matter of best practice,
Appointment and removal. Subject to the requirements of the listing standards, the board may appoint and remove committee members in accordance with the company’s bylaws. Committee members will serve for such terms as the board may fix, and in any case at the board’s will, whether or not a specific term is fixed. The board will designate a committee member as the chairperson of the committee.

Duties and responsibilities

Qualifications of directors. The committee will periodically, and no less frequently than annually, meet to assess, develop and communicate with the full board concerning the appropriate criteria for nominating and appointing directors, including:

- the board’s size and composition;

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this charter does not contemplate that such a director would sit on the committee. Note that Item 407(a) of Regulation S-K under the Exchange Act requires disclosure of whether directors meet the independence standards.

7 Check the company’s bylaws to ensure this is addressed. Also, see commentary to NYSE Listed Company Manual §303A.04.

8 This should be reviewed carefully in conjunction with any requirements imposed by the company’s bylaws and other corporate governance documents. For companies that would like definite terms for committee members, consider replacing the last sentence with the following: “At the first meeting of the board following the annual meeting of stockholders, the board will appoint members to the committee to serve for a one year term or until the earlier of his or her death, resignation or retirement or a successor is duly appointed. The board may fill vacancies on the committee by a majority vote of the authorized number of directors, but may remove committee members only with the approval of a majority of the independent directors then serving on the full board.”

9 Review the company’s bylaws to determine the process for appointing a committee chair and revise as necessary to ensure conformity.

10 In light of increased stockholder activism and initiatives seeking corporations to disclose the details of their political activities and expenditures, some companies now include reviewing the company’s policies and practices with regards to political activities as well as spending as a duty and responsibility of the nominating and corporate governance committee. An example of such a charter provision follows:

Political spending policies and practices. The committee will review, at least annually, the company’s policies and practices related to political and campaign contributions, and contributions to trade associations and other similar organizations that may engage in political activity as well as reports on the company’s political spending.
• corporate governance policies;

• applicable listing standards and laws;

• individual director performance, expertise, experience, qualifications, attributes, skills and willingness to serve actively;\(^{11}\)

• the number of other public and private company boards on which a director candidate serves;

• consideration of director nominees proposed or recommended by stockholders and related policies and procedures; and\(^ {12}\)

• other appropriate factors.

**Director nominees and vacancies.** The committee will timely [select] [recommend to the board of directors] individuals for nomination as directors at each annual meeting of stockholders and [appoint] [recommend to the board of directors for appointment] individuals to fill vacancies on the board of directors, subject to legal rights, if any, of third parties to nominate or appoint directors.\(^{13}\) [The committee will

\(^{11}\) This captures the SEC’s disclosure requirements on whether and how the nominating committee considers diversity as a factor in identifying nominees for director. Because this charter is designed to work together with our form of corporate governance guidelines, we recommend you also review the companion provision in the guidelines under “Board composition.”

\(^{12}\) See Item 407(c)(2)(iv) of Regulation S-K which requires proxy statement disclosure of any policy with regard to the consideration of any director candidates recommended by security holders and, if any recommendations are to be considered, any procedures to be followed by security holders in submitting the recommendations. Consider also the effect of any bylaw provisions regarding stockholder proposals and the SEC’s stockholder proposal rules for proxy statements.

\(^{13}\) This should be reviewed carefully for consistency with the company’s bylaws and other corporate governance documents. Note that, under the NASDAQ listing standards, a majority of the independent directors would be required to approve the nomination or recommendation if the committee does not have the power to do so. Additionally, over the past several proxy seasons, stockholder proposals have been submitted in increasing numbers requesting public companies to amend their bylaws to provide for proxy access and many companies have adopted such provisions; this section may need to be revised accordingly if the company adopts a proxy access bylaw.
also consider and recommend to the board whether to accept or reject a director resignation, or take other action, where a director fails to receive a majority vote in a non-contested election as specified under the company’s bylaws [and corporate governance guidelines].\(^\text{14}\) [The committee shall also be responsible for developing a succession plan for the board and for making recommendations to the full board on director succession matters.]

Committee appointments.\(^\text{15}\) If and when requested periodically by the board, the committee will identify and recommend to the board the appointees to be selected by the board for service on the committees of the board, including recommending a chairperson for each committee.

Governance policies.\(^\text{16}\) The committee will develop and, no less frequently than annually, assess and make recommendations to the board concerning appropriate corporate governance guidelines and policies. The committee shall have oversight over the company’s corporate governance guidelines and policies governing the full board as they relate to matters concerning the selection of individuals to serve on the board. [The company’s corporate governance guidelines, as amended from time to time, are hereby incorporated into this charter.\(^\text{17}\)]

\(^{14}\) If the company’s bylaws provide for a majority vote standard in non-contested director elections, consider adding this provision as a best practice in order to have a committee of independent directors review the circumstances leading up to the failed vote. A company may also have a corresponding provision in its corporate governance guidelines regarding director election voting standards; review for consistency.

\(^{15}\) Considered a best practice. Review the company’s bylaws to ensure consistency.

\(^{16}\) See NYSE Listed Company Manual §303A.04(b)(i); considered a best practice for NASDAQ listed companies.

\(^{17}\) This ensures consistency with the company’s corporate governance guidelines, as director qualifications and governance policies usually appear in the corporate governance guidelines.
Stockholder proposals\textsuperscript{18} and engagement.\textsuperscript{19} The committee will review stockholder proposals [, except for stockholder proposals pertaining to compensation matters which are reviewed by the board’s compensation committee,]\textsuperscript{20} and recommend responses to such proposals to the board. The committee will also review and provide guidance to management and the full board on the framework for the board’s oversight of and involvement in stockholder engagement.

Board evaluation.\textsuperscript{21} The committee will oversee an annual review of the performance of the full board and report the results thereof to the full board.

Charter; annual performance review. The committee will review and reassess the adequacy of this charter at least annually and recommend to the board amendments as the committee deems appropriate. The committee will also evaluate its own performance as a committee on an annual basis and report the results thereof to the full board.\textsuperscript{22}

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\textsuperscript{18} Consider adding if the board prefers to have this governance matter first reviewed and considered by the committee. Having the committee that regularly reviews and recommends governance policies and practices also consider and make recommendations on stockholder proposals is often considered practical and can expedite the review process when a company receives a proposal.\textsuperscript{19}

\textsuperscript{19} With the continuing rise in stockholder activism in recent years, proactively developing guidance for management and the full board in this area may assist in the company’s preparedness and response to stockholders.\textsuperscript{20}

\textsuperscript{20} Consider inserting this clause if the board prefers to have stockholder proposals pertaining to compensation matters first reviewed and considered by the compensation committee since that committee regularly reviews and considers company compensation matters. Our forms of Compensation Committee Charter provide clauses for that committee first reviewing stockholder proposals pertaining to compensation matters.\textsuperscript{21}

\textsuperscript{21} See NYSE Listed Company Manual §303A.04(b)(i); considered a best practice for NASDAQ listed companies.\textsuperscript{22}

\textsuperscript{22} The committee’s self-evaluation is required by NYSE Listed Company Manual §303A.04(b)(ii); considered a best practice for NASDAQ listed companies. The evaluation of the charter is not required by either the NYSE or NASDAQ. If other board committees will be performing annual self-evaluations as well, consider adding language for the committee to oversee and administer this process if it is the practice of the board to assign such oversight to the nominating and corporate governance committee:

“The committee will also establish procedures for and administer the annual performance
Other directorships. The committee will review directorships in other public companies held by or offered to directors and executive officers of the company as needed. The committee will also review any changes in director circumstances and make a recommendation to the board concerning such matter.23

Other functions. The committee may perform any other activities consistent with this charter, the company’s corporate governance documents and applicable listing standards, laws and regulations as the committee or the board considers appropriate and report to the full board the major items covered by the committee at each meeting thereof.24

General25

Committee access and information. The committee is at all times authorized to have direct, independent and confidential access to the company’s other directors, management and personnel to carry out the committee’s purposes. The committee is authorized to conduct or authorize investigations into any matters relating to the purposes, duties or responsibilities of the committee.

Committee advisers and funding. The committee will have sole authority to retain at the company’s expense and terminate any search firm used to identify director candidates, independent counsel or other advisers to the committee and to approve the related fees and other retention terms.26 The committee will have sole authority to approve evaluations of the board’s other standing committees by their membership.”

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23 Consider including this provision if the board prefers to delegate reviewing additional board memberships/changes in director circumstances to the committee. Also confirm consistency with corporate governance guidelines.

24 Considered a best practice; see also commentary to NYSE Listed Company Manual §303A.04.

25 Ensure consistency with bylaws and corporate governance guidelines.

26 Commentary to NYSE Listed Company Manual §303A.04 recommends that this committee have sole authority with respect to search firms to identify director candidates but does not address the other enumerated advisers. NASDAQ listing standards do not contain any such requirement.
the engagement of any such consultant or its affiliates for additional services to the company, including the purchase of any products from such consultant or its affiliates.\textsuperscript{27}

\emph{Committee Structure and Operations}. The committee will fix its own rules of procedure and shall meet as provided by such rules or by resolution of the committee. The committee may establish sub-committees consisting of one or more members to carry out such duties as the committee may assign.\textsuperscript{28}

\emph{Reliance on others}. Nothing in this charter is intended to preclude or impair the protection provided in Section 141(e) of the Delaware General Corporation Law for good faith reliance by members of the committee on reports or other information provided by others.\textsuperscript{29}

\textsuperscript{27} Considered a best practice to help ensure the independence from management of any search firm or other adviser to the committee.

\textsuperscript{28} Providing for flexibility to establish sub-committees is considered good practice; see commentary to NYSE Listed Company Manual §303A.04 and ensure consistency with other governance documents.

\textsuperscript{29} Make changes as necessary for companies that are not incorporated in Delaware.
Annotated Forms of Compensation Committee Charter

These forms of compensation committee charters are designed to comply with SEC rules on equity compensation plans, corporate governance and executive compensation\(^1\) and NYSE and NASDAQ listing standards \(^2\) and reflect what we consider as best practice.

**Latest Developments**

**SEC Rulemaking**

On August 5, 2015, the SEC adopted rules to implement the CEO pay ratio disclosure requirements under Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). The final rules can be found at [http://www.sec.gov/rules/final/2015/33-9877.pdf](http://www.sec.gov/rules/final/2015/33-9877.pdf). The rules add new letter (u) to Item 402 of Regulation S-K, requiring that a company disclose (1) the median of the annual total compensation of all of its employees, excluding the CEO, (2) the annual total compensation of the CEO, and (3) the ratio of the annual total compensation of the median employee to the CEO’s annual total compensation. Effective for the first fiscal year beginning on or after January 1, 2017, these new disclosures must be made in any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. Although these rules do not require any amendments to the compensation committee charter, the new disclosures will be deemed “filed” with the SEC for liability purposes (as is all other Item 402

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\(^1\) See Regulation S-K Items 402 and 407.

information), and compensation committee members should be made aware of the new reporting requirements now and when the rules become effective, review the disclosures to be made in conjunction with their review of the CD&A.

On July 1, 2015, pursuant to the requirements of the Dodd-Frank Act, the SEC released proposed rules directing the national securities exchanges and associations to establish listing standards requiring issuers to adopt and comply with written policies for recovery of incentive-based compensation based upon accounting restatements over a period of three years and to disclose those recovery policies in accordance with SEC rules (commonly known as “clawback of executive compensation”). The proposed rules can be found at http://www.sec.gov/rules/proposed/2015/33-9861.pdf. The comment period closed September 14, 2015. Even though these requirements will not likely take effect prior to the 2016 proxy season, we recommend that companies start planning for these changes now and that compensation committee members be made aware of the proposed rules. Additionally, companies may wish to add a reference to establishing clawback policies to the duties and responsibilities of the compensation committee in the charter. Our form provides an example of such a reference. Please contact the Baker & McKenzie attorney you work with to review the potential compliance requirements for your company and for further guidance.

On April 29, 2015, the SEC released proposed rules to implement the enhanced disclosure requirements for the relationship between executive compensation actually paid and the financial performance of the company (commonly known as “pay versus performance” disclosure). As proposed, the rules would require companies to include a new pay versus performance table in proxy statements and consent solicitations in which executive compensation disclosure is required pursuant to Item 402 of Regulation S-K. The proposed rules can be found at http://www.sec.gov/rules/proposed.shtml. The comment period closed on July 6, 2015. The new rules could become effective as early as the 2016 proxy season; therefore, companies
should review the proposed rules and seek guidance from the Baker & McKenzie attorney with whom they work.

On February 9, 2015, the SEC released proposed rules to implement the hedging policy disclosure requirements under Section 955 of the Dodd-Frank Act. As proposed, the rules will require a company to disclose whether it permits its employees (including officers) and directors to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds) or otherwise engage in hedging transactions or other transactions offsetting any decreases in the market value of equity securities granted by the company as compensation or held, directly or indirectly, by employees or directors. To implement the rules, the SEC is proposing new Item 407(i) of Regulation S-K, believing that the disclosure required is primarily corporate governance related. The SEC noted potential overlap with CD&A disclosures, as Item 402(b) of Regulation S-K lists as one example of potentially material disclosure about a company’s executive compensation program “any registrant policies regarding hedging the economic risk” of ownership of the company’s securities. The Dodd-Frank Act requirement is broader than the CD&A provision. Accordingly, the SEC is proposing to amend Item 402(b) to add an instruction providing that a company may satisfy any CD&A obligation to disclose material policies on hedging by named executive officers by cross-referencing the Item 407(i) disclosure to the extent that the information satisfies the CD&A disclosure requirement. The comment period closed on April 20, 2015; however, no final rules have been issued by the SEC as of the date of these materials. Companies should review the proposed rules and consider whether any updates should be made to their current policies and consult with the Baker & McKenzie attorney with whom they work for further guidance in this area.

Delaware Corporate Law

Of note concerning director compensation is the 2015 Delaware Court of Chancery holding in *Calma v. Templeton*, C.A. No. 9579-CB (Del. Ch. April 30, 2015). The case involved a challenge to equity awards
made to non-employee directors under a stockholder approved plan. Up until this case, Delaware courts had historically reviewed these cases under the business judgment rule. In *Calma*, the Court held that the stockholder ratification defense the directors were asserting, which allowed directors to avoid the entire fairness standard of review and maintain the presumptions of the deferential business judgment rule, applied to a review of compensation grants only when the company’s underlying compensation plan approved by stockholders specifies the amount or form of compensation to be issued to a company’s non-employee directors. The court ruled that because the plan included no “meaningful limit” on the number of awards that could be made to a single director, stockholder approval of the plan did not amount to ratification and therefore the awards should be evaluated under the entire fairness standard, thereby making it easier for plaintiffs to bring suits over director compensation. In light of this decision, companies may wish to be proactive in reviewing existing director compensation arrangements in order to reduce the risk of these types of lawsuits. Please consult with the Baker & McKenzie attorney with whom you work with for further guidance.

*Policies of Proxy Advisory Firms and Other Large Institutional Investors*

When reviewing committee charters and other governance policies, companies may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of their larger institutional stockholders, which are usually published and available on their websites.

*This document is designed primarily for use by listed US domestic issuers that are not the types of entities that receive special treatment under the applicable SEC rules and exchange standards, such as controlled companies, smaller reporting companies, foreign private issuers or companies listing only preferred or debt securities. Although it may be a useful resource for other types of entities, including unlisted companies, it is not designed to be used as a model*
Annotated Forms of Compensation Committee Charter

charter for such entities. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual market’s listing standards, which this document does not address.

We recommend that companies review the respective form of compensation committee charter together with our form of corporate governance guidelines and public company bylaws. Because corporate governance practices vary widely from company to company, the form charter does not attempt to address all corporate governance functions that may be performed by the compensation committee. The form charter will need to be customized as necessary to reflect the role in corporate governance activities that is assigned to the compensation committee. The form of compensation committee charter does not contain any provisions regarding notice of meetings, procedure, quorum requirements or action by written consent as these matters are typically addressed in a company’s bylaws. To the extent the bylaws do not contain such provisions, appropriate provisions should be included in the committee charter.

The respective form of compensation committee charter is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.

Note: It is always recommended to monitor the latest SEC Compliance and Disclosure Interpretations related to corporate governance, executive compensation and disclosure available on the SEC’s website at http://www.sec.gov/divisions/corpfin/cfguidance.shtml.
(NYSE Listed Company)

CHARTER

OF THE

COMPENSATION COMMITTEE\(^1\)

OF

THE BOARD OF DIRECTORS

OF

_____________________________________

[Adopted] [Amended and restated] as of ________, 20__

Purposes

The primary purposes of the committee are to have direct responsibility to:

- review and approve corporate goals and objectives relevant to the chief executive officer’s (“CEO”) compensation;\(^2\)

\(^1\) The compensation committee may have a broader role than determining executive compensation. In that case, the name of the committee and the purpose clause should reflect the committee’s expanded role. The company’s articles, bylaws, equity compensation and other benefit plans, corporate governance guidelines, and other committee charters should be reviewed to ensure that this charter is consistent with each of those documents. The company may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of its larger institutional stockholders, which are usually published and available on their websites.

\(^2\) See NYSE Listed Company Manual §303A.05(b)(i)(A).
• evaluate the CEO’s performance in light of those goals and objectives;\textsuperscript{3}

• either as a committee or (if so directed by the board) together with the other independent directors, determine and approve the CEO’s compensation based on this evaluation;\textsuperscript{4}

• [make recommendations to the board with respect to] [determine and approve]\textsuperscript{5} (to the extent set forth in this charter or otherwise directed by the board) compensation of the other executive officers (as defined herein) and make recommendations to the board with respect to incentive compensation plans and equity-based plans that are subject to board approval;\textsuperscript{6}

• [Best Practice:] exercise oversight with respect to the company’s compensation philosophy,\textsuperscript{7} incentive compensation plans, equity-based plans and [insert other compensation plans as applicable to your company] covering executive officers and senior management;\textsuperscript{8}

\textsuperscript{3} See NYSE Listed Company Manual §303A.05(b)(i)(A).
\textsuperscript{4} See NYSE Listed Company Manual §303A.05(b)(i)(A).
\textsuperscript{5} See NYSE Listed Company Manual §303A.05(b)(i)(B). The commentary to NYSE Listed Company Manual §303A.05 provides that the board is not precluded from delegating its authority over non-CEO compensation matters to the compensation committee.
\textsuperscript{6} See NYSE Listed Company Manual §303A.05(b)(i)(B). Also considered best practice for Section 162(m) purposes.
\textsuperscript{7} Given the increased scrutiny on pay for performance and in anticipation of SEC rulemaking in this regard, compensation committees may wish to routinely discuss their company’s pay for performance linkage.
\textsuperscript{8} Note that the SEC’s 2009 proxy disclosure enhancement regulations created disclosure obligations that require reporting companies to assess the relationship between a company’s overall compensation policies and practices for all employees (not just executive officers) and risk. If the company determines that risks arising from the compensation policies and practices are reasonably likely to have a material adverse effect on the company, companies must provide a narrative disclosure to this effect in the annual report on Form 10-K or annual meeting proxy statement, as appropriate, in compliance with Regulation S-K Item 402(s). We recommend that company management conduct this risk assessment function on at least an annual basis with oversight by the board. To the extent that risk considerations are a material aspect of a
•  [Best Practice:] review and discuss with management the company’s Compensation Discussion & Analysis required by SEC rules to be included in the company’s proxy statement and annual report on Form 10-K, and

•  produce the annual compensation committee report for inclusion in the company’s proxy statement and annual report on Form 10-K.

Composition

Membership. The committee must consist of at least [two] directors.11

Independence.12 All committee members must have been determined by the board to be independent as defined and to the extent required in the company’s compensation policies or decisions with respect to named executive officers, the company is also required to discuss them as part of the Compensation Discussion & Analysis (CD&A).

9 See Item 407(e)(5)(i) of Regulation S-K.

10 See Item 407(e)(5) of Regulation S-K and NYSE Listed Company Manual §303A.05(b)(i)(C).

11 Currently, NYSE listing standards do not specify a minimum.

12 NYSE Listed Company Manual §303A.02 provides that in determining independence:

“The board must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director’s ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to: (A) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and (B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.”

NYSE commentary further provides that:

“When considering the sources of a director’s compensation in determining his independence for purposes of compensation committee service, the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company’s executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company’s executive compensation.”
the applicable SEC rules and NYSE listing standards, as they may be amended from time to time (the “listing standards”) and must otherwise meet the requirements for committee membership as determined by the listing standards. In addition, at least two of the committee members must qualify as “non-employee directors” within the meaning of Securities Exchange Act Rule 16b-3, and as “outside directors” within the meaning of Section 162(m) of the Internal Revenue Code of 1986.¹³

Appointment and removal. Subject to any requirements of the listing standards, the board may appoint and remove committee members in accordance with the company’s bylaws.¹⁴ Committee members will serve for such terms as the board may fix, and in any case at the board’s will, whether or not a specific term is fixed. The board will designate a committee member as the chairperson of the committee.¹⁵

Duties and responsibilities

Compensation goals for CEO and determination of compensation of CEO and other executive officers. The committee will:

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¹³ Section 162(m) requires that performance goals intended to qualify for the performance-based compensation exception must be approved by a committee consisting solely of two or more “outside directors.” Satisfaction of Section 162(m) and/or Exchange Act Rule 16b-3 requirements may be accomplished by the delegation of the relevant decisions to a conforming two-person subcommittee or by the recusal or abstention of the non-conforming members if at least two conforming members remain. See PLR 9811029 (Dec. 9, 1997); American Society of Corporate Secretaries, 1996 SEC No-Act, Lexis 910 (Dec. 11, 1996). The definitions of “non-employee director” and “outside director” are different and a frequent source of error. For example, a former executive can never be an “outside director” for 162(m) purposes.

¹⁴ Check the company’s bylaws to ensure this is addressed. Also see commentary to NYSE Listed Company Manual §303A.05.

¹⁵ Review the company’s bylaws to determine the process for appointing a committee chair and revise as necessary to ensure conformity.
• meet at least annually to review and approve corporate goals and objectives relevant to the compensation of the CEO;\textsuperscript{16}

• evaluate, at least annually, the performance of the company’s CEO [and other executive officers]\textsuperscript{17} in light of the corporate goals and objectives;

• at least annually, either as a committee or together with the other independent directors (as directed by the board), in light of the corporate goals and objectives and the performance evaluation, determine and approve the compensation of the CEO, including individual elements of salary, bonus, supplemental retirement, incentive and equity compensation;\textsuperscript{18}

• at least annually, [make recommendations to the board with respect to] [determine and approve] the compensation of the other executive officers, including individual elements of salary, bonus, supplemental retirement, incentive and equity compensation, in light of the corporate goals and objectives [and the performance evaluations];\textsuperscript{19}

• make recommendations to the board with respect to incentive compensation plans and equity-based plans;\textsuperscript{20}

• review, as the committee considers appropriate in setting CEO and other executive officer compensation, company performance and relative stockholder return, compensation at comparable

\textsuperscript{16} See NYSE Listed Company Manual §303A.05(b)(i)(A).

\textsuperscript{17} NYSE listing standards do not require that the committee evaluate the performance of non-CEO executive officers; however, as a best practice, the committee should conduct such evaluations if they either determine or make recommendations to the board regarding compensation of non-CEO executive officers, which is required (see footnote 19 below).

\textsuperscript{18} See NYSE Listed Company Manual §303A.05(b)(i)(A).

\textsuperscript{19} See footnote 17 above; include if the committee also performs evaluations of executive officers.

\textsuperscript{20} See NYSE Listed Company Manual §303A.05(b)(i)(B).
companies, past years’ compensation to the company’s CEO and other executive officers, and other relevant factors;\textsuperscript{21}

- review and approve all employment agreements, separation and severance agreements, and other compensatory contracts, arrangements, perquisites and payments with respect to the CEO [and other executive officers];\textsuperscript{22}

- [Best Practice:] review and approve the selection of the company’s peer group; and

- [Best Practice:] fulfill any other duties or responsibilities the committee deems necessary or appropriate or as expressly delegated to the committee by the board from time to time relating to the company’s compensation programs.

For purposes of this charter, “executive officers” means the individuals classified by the company as officers for purposes of SEC rules under Section 16 of the Securities Exchange Act of 1934, as amended (“Exchange Act”).\textsuperscript{23}

[Best Practice: Additionally, in any deliberations or voting to determine the compensation of the CEO, the CEO may not be present; however, in any deliberations regarding the compensation of other executive officers, the committee may elect to invite the CEO to be present.]\textsuperscript{24}

\textsuperscript{21} See commentary to NYSE Listed Company Manual §303A.05.

\textsuperscript{22} Implicit in NYSE Listed Company Manual §303A.05.

\textsuperscript{23} Not specifically defined in NYSE Listed Company Manual; definition is analogous to NASDAQ Marketplace Rule 5605(a)(1).

\textsuperscript{24} Analogous to NASDAQ Marketplace Rule 5605(d)(1)(C).
Succession planning. At least annually, the committee will consider and assist the board in developing succession plans for the CEO and other key executive officers and appropriate management personnel.25

Non-employee director compensation. The committee will [recommend to the board] [approve] compensation programs for non-employee directors, [the lead independent director,]26 committee chairpersons, and committee members, consistent with any applicable requirements of the listing standards for independent directors and including consideration of cash and equity components of this compensation.27

Equity plan awards. The committee will grant stock options, restricted stock and other discretionary awards under the company’s stock option and other equity incentive plans, and otherwise exercise the authority of the board of directors with respect to oversight and administration of the company’s stock-based and other incentive compensation plans.28 [The committee may delegate to one or more

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25 Considered a best practice. Ensure this is consistent with corporate governance guidelines.

26 If the company creates a “lead independent director” role, include such position in the list of compensation programs to be considered.

27 Considered a best practice. Ensure this is consistent with corporate governance guidelines. Additionally of note concerning director compensation is the 2015 Delaware Court of Chancery holding in Calma v. Templeton, C.A. No. 9579-CB (Del. Ch. April 30, 2015). The case involved a challenge to equity awards made to non-employee directors under a stockholder approved plan. Up until this case, Delaware courts had historically reviewed these cases under the business judgment rule. In Calma, the Court held that the stockholder ratification defense the directors were asserting, which allowed directors to avoid the entire fairness standard of review and maintain the presumptions of the deferential business judgment rule, applied to a review of compensation grants only when the company’s underlying compensation plan approved by stockholders specifies the amount or form of compensation to be issued to a company’s non-employee directors. The court ruled that because the plan included no “meaningful limit” on the number of awards that could be made to a single director, stockholder approval of the plan did not amount to ratification and therefore the awards should be evaluated under the entire fairness standard, thereby making it easier for plaintiffs to bring suits over director compensation. In light of this decision, companies may wish to be proactive in reviewing existing director compensation arrangements in order to reduce the risk of these types of lawsuits. Please consult with the Baker & McKenzie attorney with whom you work for further guidance.

28 Certain compensation plans vest control over the administration of the plan with the board of directors or allocate certain types of administrative responsibilities between the board and an
officers designated by the committee the authority to make grants of options and restricted stock to eligible individuals other than directors and executive officers, provided that the committee shall have fixed the exercise price or a formula for determining the exercise price for each grant, approved the vesting schedule, authorized any alternative provisions as are necessary or desirable to facilitate legal compliance or to ensure the effectiveness or tax-qualified status of the award under the laws of countries outside the US when grants are made to non-US employees, approved the form of documentation evidencing each grant, and determined the number of shares or the basis for determining such number of shares by position, compensation level or category of personnel. Any officer to whom such authority is delegated must regularly report to the committee the grants so made.\[30\] [Note: SEC rules require a detailed disclosure of whether the committee may delegate its authority and to whom. See Regulation S-K item 407(e)(3)(i)(B) and tailor this provision as appropriate.]

**Evaluate and approve stock and incentive plans.** The committee will periodically review and make recommendations to the board concerning the company’s stock and incentive compensation plans. The committee will approve all equity arrangements and plans, and amendments to these arrangements or plans, that may be exempt from

administrative committee. The compensation committee is not required by listing standards to administer equity plans, and the entire board or another committee may ultimately be responsible for this instead of the compensation committee.

29 This clause should be used only if grants may be made to officers, directors or employees outside the US. Reference should be made to the plan document to ensure the committee’s authority is described properly.

30 Considered a best practice. Delegation of authority to officers to grant stock awards is permitted by DGCL §§141-142. If organized in a jurisdiction other than in Delaware, check the laws of the jurisdiction of organization to ensure such delegation is permitted by applicable law. These last two sentences are not legally necessary but are a matter of administrative convenience, particularly for larger companies. In situations where a separate committee will have authority to make equity grants, replace these sentences with:

“A secondary committee of one or more directors may be appointed by either the committee or the board of directors to have separate but concurrent authority with the committee to grant stock options and other discretionary awards under the company’s stock-based and other incentive compensation plans to all eligible individuals other than directors and executive officers.”
the general requirement of the listing standards to obtain stockholder approval of equity arrangements, plans and amendments, or for which approval by the committee is otherwise appropriate or required under applicable laws or listing standards.  

Compensation Discussion & Analysis ("CD&A") and compensation committee report; other executive compensation matters. The committee will review and discuss with management the company’s CD&A prepared in accordance with SEC regulations and determine whether to recommend to the board that the CD&A be included in the company’s proxy statement and annual report on Form 10-K. The committee will timely prepare and approve a compensation committee report on executive compensation for inclusion in the company’s proxy statement and Form 10-K as required by the SEC. The committee will also oversee the company’s compliance with SEC rules and regulations and NYSE listing standards, as applicable, regarding stockholder advisory votes with respect to certain executive compensation matters, including non-binding advisory votes on executive compensation, the frequency of such votes and on “golden parachute” payments and clawback policies.

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31 §303A.08 of the NYSE’s Listed Company Manual requires that most plans and material amendments thereto must be approved by stockholders. For plans and amendments that are not required to be approved by stockholders, these listing standards require as a general matter the approval of the compensation committee or a majority of independent directors.

32 See Item 407(e)(5) of Regulation S-K.

33 Considered a best practice for say-on-pay matters.

34 On July 1, 2015, pursuant to the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC released proposed rules directing the national securities exchanges and associations to establish listing standards requiring issuers to adopt and comply with written policies for recovery of incentive-based compensation based upon accounting restatements over a period of three years and to disclose those recovery policies in accordance with SEC rules (commonly known as “clawback of executive compensation”). The proposed rules can be found at http://www.sec.gov/rules/proposed/2015/33-9861.pdf. As of the date of these materials, final rules have not been adopted. However, compensation committees may wish to add overseeing clawback policies to their duties and responsibilities. Please consult with the Baker & McKenzie attorney with whom you work with for further guidance.
[Stockholder proposals. The committee will review stockholder proposals pertaining to compensation matters and recommend responses to such proposals to the board.]\(^35\)

Risk oversight. At least annually, the committee will review incentive compensation arrangements to confirm that incentive pay arrangements do not create or encourage unnecessary risk-taking\(^36\) and report the results thereof to the full board.

Charter; annual performance review. The committee will review and reassess the adequacy of this charter at least annually and recommend to the board amendments as the committee deems appropriate.\(^37\) The committee will also evaluate its own performance as a committee on an annual basis and report the results thereof to the full board.\(^38\)

Other functions and reporting. The committee may perform any other activities consistent with this charter, the company’s corporate governance documents and applicable listing standards, laws and regulations as the committee or the board considers appropriate. The committee will report regularly to the full board the major items covered at each of its meetings.\(^39\)

\(^35\) Consider adding this clause if the board prefers to have stockholder proposals pertaining to compensation matters first reviewed and considered by the committee. Having the committee that regularly reviews and considers company compensation matters make recommendations on stockholder proposals in this area can expedite the review process when a company receives a proposal. Our form of Nominating and Corporate Governance Committee Charter provides for that committee first reviewing stockholder proposals on all other matters.

\(^36\) The SEC’s proxy disclosure rules require disclosure about the relationship between a company’s overall compensation policies and practices and material risks arising from the compensation policies.

\(^37\) Although NYSE listing rules do not require an annual assessment of the charter, such evaluation is considered a best practice and is analogous to the NASDAQ requirement.

\(^38\) See NYSE Listed Company Manual §303A.05(b)(ii).

\(^39\) Commentary to NYSE Listed Company Manual §303A.05 states that the charter should also address committee reporting to the full board.
General\(^{40}\)

Committee access and information. The committee is at all times authorized to have direct, independent and confidential access to the company’s other directors, management and personnel to carry out the committee’s purposes. The committee is authorized to conduct or authorize investigations into any matters relating to the purposes, duties or responsibilities of the committee. The committee is authorized to obtain at the company’s expense compensation surveys, reports on the design and implementation of compensation programs for the company’s directors, officers and employees, and other data and documentation as the committee considers appropriate.

Committee advisers and funding.\(^{41}\) The committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser. The committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the committee. The company must provide for appropriate funding, as determined by the committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the committee.

Adviser independence evaluation.\(^{42}\) The committee may select a compensation consultant, legal counsel (other than in-house legal counsel) or other adviser only after taking into consideration all factors relevant to that person’s independence from management, including the following: (i) the provision of other services to the company by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from

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\(^{40}\) Ensure consistency with bylaws and corporate governance guidelines.

\(^{41}\) See NYSE Listed Company Manual §303A.05(c)(i)-(iii).

\(^{42}\) Prior to selecting an adviser, the committee must first take into consideration these enumerated factors that bear on the independence of such adviser. Unlike committee members, however, committee advisers are not required to be independent.
the company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the committee; (v) any stock of the company owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the company as well as any other factors required by applicable exchanges and/or the Exchange Act and corresponding rules that may be amended from time to time.

Committee Structure and Operations. The committee will fix its own rules of procedure and shall meet as provided by such rules or by resolution of the committee. The committee may establish sub-committees consisting of one or more members to carry out such duties as the committee may assign.

43 NYSE Listed Company Manual §303A.05(c)(iv)(A)-(F). NYSE commentary provides that the committee is required to conduct the independence assessment with respect to any compensation consultant, legal counsel or other adviser that provides advice to the committee, other than (1) in-house legal counsel, and (2) any adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(c)(3)(iii) of Regulation S-K: (a) consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. In addition, NYSE commentary also provides that nothing in the rules shall be construed to (A) require the committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the committee; or (B) to affect the ability or obligation of the committee to exercise its own judgment in fulfillment of its duties.

44 Providing for flexibility to establish sub-committees is considered good practice; see commentary to NYSE Listed Company Manual §303A.05(b)(iii) and ensure consistency with other governance documents.
Reliance on others. Nothing in this charter is intended to preclude or impair the protection provided in Section 141(e) of the Delaware General Corporation Law for good faith reliance by members of the committee on reports or other information provided by others.\footnote{Make changes as necessary for companies that are not incorporated in Delaware.}
(NASDAQ Listed Company)

CHARTER

OF THE

COMPENSATION COMMITTEE\(^1\)

OF

THE BOARD OF DIRECTORS

OF

[Adopted] [Amended and restated] as of ________, 20__

Purposes

The primary purposes of the committee are to have direct responsibility to:

- determine, or recommend to the board for determination, the compensation of the chief executive officer ("CEO") and all other

\(^1\) The compensation committee may have a broader role than determining executive compensation. In that case, the name of the committee and the purpose clause should reflect the committee’s expanded role. Additionally, NASDAQ Marketplace Rule 5605(d)(1)(A) provides that the charter must specify “the scope of the compensation committee’s responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements.” The company’s articles, bylaws, equity compensation and other benefit plans, corporate governance guidelines, and other committee charters should be reviewed to ensure that this charter is consistent with each of those documents. The company may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of its larger institutional stockholders, which are usually published and available on their websites.
executive officers (as defined herein) of the company;²

- [Best Practice:] make recommendations to the board with respect to incentive compensation plans and equity-based plans that are subject to board approval;³

- [Best Practice:] exercise oversight with respect to the company’s compensation philosophy,⁴ incentive compensation plans, equity-based plans and [insert other compensation plans as applicable to your company] covering executive officers and senior management;⁵

- [Best Practice:] review and discuss with management the company’s Compensation Discussion & Analysis required by SEC rules to be included in the company’s proxy statement and annual report on Form 10-K;⁶ and

² See NASDAQ Marketplace Rule 5605(d)(1)(B)-(C).

³ Provisions pertaining to approving incentive and equity plans are not expressly required under NASDAQ Marketplace Rules but are considered best practice for Section 162(m) purposes.

⁴ Given the increased scrutiny on pay for performance and in anticipation of SEC rulemaking in this regard, compensation committees may wish to routinely discuss their company’s pay for performance linkage.

⁵ Note that the SEC’s 2009 proxy disclosure enhancement regulations created disclosure obligations that require reporting companies to assess the relationship between a company’s overall compensation policies and practices for all employees (not just executive officers) and risk. If the company determines that risks arising from the compensation policies and practices are reasonably likely to have a material adverse effect on the company, companies must provide a narrative disclosure to this effect in the annual report on Form 10-K or annual meeting proxy statement, as appropriate, in compliance with Regulation S-K Item 402(s). We recommend that company management conduct this risk assessment function on at least an annual basis with oversight by the board. To the extent that risk considerations are a material aspect of a company’s compensation policies or decisions with respect to named executive officers, the company is also required to discuss them as part of the CD&A.

⁶ See Item 407(e)(5)(i) of Regulation S-K.
• [Best Practice:] produce the annual compensation committee report for inclusion in the company’s proxy statement and annual report on Form 10-K.⁷

Composition

Membership. The committee must consist of at least [two] directors.⁸

Independence.⁹ All committee members must have been determined by the board to be independent as defined and to the extent required in the applicable SEC rules and NASDAQ listing standards, as they may be amended from time to time (the “listing standards”) and must otherwise meet the requirements for committee membership as determined by the listing standards. In addition, at least two of the committee members must qualify as “non-employee directors” within the meaning of Securities Exchange Act Rule 16b-3, and as “outside

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⁷ See Item 407(c)(5) of Regulation S-K.
⁸ NASDAQ Marketplace Rule 5605(d)(2)(A) requires that the compensation committee be composed of at least two members, each of whom must be independent; see footnote 9 below. If a non-independent director is permitted to be a member of the committee under “exceptional and limited circumstances,” then NASDAQ Marketplace Rule 5605(d)(2)(B) requires a minimum of three members on the committee.
⁹ NASDAQ Marketplace Rule 5605(d)(2), as amended in November 2013, provides that in determining eligibility to serve on a compensation committee:

“Each company must have, and certify that it has and will continue to have, a compensation committee, of at least two members. Each committee member must be an Independent Director as defined under Rule 5605(a)(2). In addition, in affirmatively determining the independence of any director who will serve on the compensation committee of a board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the Company which is material to that director’s ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to: (i) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the Company to such director; and (ii) whether such director is affiliated with the Company, a subsidiary of the Company or an affiliate of a subsidiary of the Company.” NASDAQ’s amended rules also removed the exceptions for excluding board and committee fees and retirement plan compensation from consideration as compensatory fees; accordingly, NASDAQ has stated that the board must now consider such fees in affirmatively determining the independence of compensation committee members. See additional commentary under IM-5605-6.

See also Exchange Act Rule 10C-1(b)(1).
directors” within the meaning of Section 162(m) of the Internal Revenue Code of 1986.\(^{10}\)

Appointment and removal. Subject to any requirements of the listing standards, the board may appoint and remove committee members in accordance with the company’s bylaws.\(^{11}\) Committee members will serve for such terms as the board may fix, and in any case at the board’s will, whether or not a specific term is fixed. The board will designate a committee member as the chairperson of the committee.\(^{12}\)

Duties and responsibilities

Determination of compensation of CEO and all other executive officers. The committee will:

- evaluate, at least annually, the performance of the company’s CEO and other executive officers in light of corporate goals and objectives;\(^{13}\)

- at least annually, determine and approve, or recommend to the board for determination and approval, the compensation of the company’s CEO and other executive officers, including individual elements of salary, bonus, supplemental retirement, incentive and

\(^{10}\) Section 162(m) requires that performance goals intended to qualify for the performance-based compensation exception must be approved by a committee consisting solely of two or more “outside directors.” Satisfaction of Section 162(m) and/or Exchange Act Rule 16b-3 requirements may be accomplished by the delegation of the relevant decisions to a conforming two-person subcommittee or by the recusal or abstention of the non-conforming members if at least two conforming members remain. See PLR 9811029 (Dec. 9, 1997); American Society of Corporate Secretaries, 1996 SEC No-Act, Lexis 910 (Dec. 11, 1996). The definitions of “non-employee director” and “outside director” are different and a frequent source of error. For example, a former executive can never be an “outside director” for 162(m) purposes.

\(^{11}\) Check the company’s bylaws to ensure this is addressed.

\(^{12}\) Review the company’s bylaws to determine the process for appointing a committee chair and revise as necessary to ensure conformity.

\(^{13}\) Considered a best practice in order to set compensation. Derived from the requirements of NYSE Listed Company Manual §303A.05.
equity compensation, in light of the corporate goals and objectives and the performance evaluations;14

• review, as the committee considers appropriate in setting CEO and other executive officer compensation, company performance and relative stockholder return, compensation at comparable companies, past years’ compensation to the company’s CEO and other executive officers, and other relevant factors;15

• review and approve all employment agreements, separation and severance agreements, and other compensatory contracts, arrangements, perquisites and payments with respect to the CEO and other executive officers;16

• [Best Practice:] review and approve the selection of the company’s peer group; and

• [Best Practice:] fulfill any other duties or responsibilities the committee deems necessary or appropriate or as expressly delegated to the committee by the board from time to time relating to the company’s compensation programs.

For purposes of this charter, “executive officers” means the individuals classified by the company as officers for purposes of SEC rules under Section 16 of the Securities Exchange Act of 1934, as amended (“Exchange Act”).17

Additionally, in any deliberations or voting to determine the compensation of the CEO, the CEO may not be present; however, in

14 The committee must make this determination or recommend to the board for determination; see NASDAQ Marketplace Rule 5605(d)(1)(B).
15 Considered a best practice. Derived from commentary to NYSE Listed Company Manual §303A.05.
17 See NASDAQ Marketplace Rule 5605(a)(1).
any deliberations or voting to determine the compensation of other executive officers, the committee may elect to invite the CEO to be present.18

Succession planning. At least annually, the committee will consider and assist the board in developing succession plans for the CEO and other key executive officers and appropriate management personnel.19

Non-employee director compensation. The committee will [recommend to the board] [approve] compensation programs for non-employee directors, [the lead independent director,]20 committee chairpersons, and committee members, consistent with any applicable requirements of the listing standards for independent directors and including consideration of cash and equity components of this compensation.21

Equity plan awards. The committee will grant stock options, restricted stock and other discretionary awards under the company’s stock option and other equity incentive plans, and otherwise exercise the

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18 See NASDAQ Marketplace Rule 5605(d)(1)(C).
19 Considered a best practice. Ensure this is consistent with corporate governance guidelines.
20 If the company creates a “lead independent director” role, include such position in the list of compensation programs to be considered.
21 Considered a best practice. Ensure this is consistent with corporate governance guidelines. Additionally of note concerning director compensation is the 2015 Delaware Court of Chancery holding in Calma v. Templeton, C.A. No. 9579-CB (Del. Ch. April 30, 2015). The case involved a challenge to equity awards made to non-employee directors under a stockholder approved plan. Up until this case, Delaware courts had historically reviewed these cases under the business judgment rule. In Calma, the Court held that the stockholder ratification defense the directors were asserting, which allowed directors to avoid the entire fairness standard of review and maintain the presumptions of the deferential business judgment rule, applied to a review of compensation grants only when the company’s underlying compensation plan approved by stockholders specifies the amount or form of compensation to be issued to a company’s non-employee directors. The court ruled that because the plan included no “meaningful limit” on the number of awards that could be made to a single director, stockholder approval of the plan did not amount to ratification and therefore the awards should be evaluated under the entire fairness standard, thereby making it easier for plaintiffs to bring suits over director compensation. In light of this decision, companies may wish to be proactive in reviewing existing director compensation arrangements in order to reduce the risk of these types of lawsuits. Please consult with the Baker & McKenzie attorney with whom you work with for further guidance.
authority of the board of directors with respect to oversight and administration of the company’s stock-based and other incentive compensation plans.  

[The committee may delegate to one or more officers designated by the committee the authority to make grants of options and restricted stock to eligible individuals other than directors and executive officers, provided that the committee shall have fixed the exercise price or a formula for determining the exercise price for each grant, approved the vesting schedule, authorized any alternative provisions as are necessary or desirable to facilitate legal compliance or to ensure the effectiveness or tax-qualified status of the award under the laws of countries outside the US when grants are made to non-US employees, approved the form of documentation evidencing each grant, and determined the number of shares or the basis for determining such number of shares by position, compensation level or category of personnel. Any officer to whom such authority is delegated must regularly report to the committee the grants so made.]  

[Note: SEC rules require a detailed disclosure of whether the committee may delegate its authority and to whom. See Regulation S-K item 407(e)(3)(i)(B) and tailor this provision as appropriate.]  

22 Certain compensation plans vest control over the administration of the plan with the board of directors or allocate certain types of administrative responsibilities between the board and an administrative committee. The compensation committee is not required by listing standards to administer equity plans, and the entire board or another committee may ultimately be responsible for this instead of the compensation committee.  

23 This clause should be used only if grants may be made to officers, directors or employees outside the US. Reference should be made to the plan document to ensure the committee’s authority is described properly.  

24 Considered a best practice. Delegation of authority to officers to grant stock awards is permitted by DGCL §§141-142. If organized in a jurisdiction other than Delaware, check the laws of the jurisdiction of organization to ensure such delegation is permitted by applicable law. These last two sentences are not legally necessary but are a matter of administrative convenience, particularly for larger companies. In situations where a separate committee will have authority to make equity grants, replace these sentences with:  

“A secondary committee of one or more directors may be appointed by either the committee or the board of directors to have separate but concurrent authority with the committee to grant stock options and other discretionary awards under the company’s stock-based and other incentive compensation plans to all eligible individuals other than directors and executive officers.”
Evaluate and approve stock and incentive plans. The committee will periodically review and make recommendations to the board concerning the company’s stock and incentive compensation plans. The committee will approve all equity arrangements and plans, and amendments to these arrangements or plans, that may be exempt from the general requirement of the listing standards to obtain stockholder approval of equity arrangements, plans and amendments, or for which approval by the committee is otherwise appropriate or required under applicable laws or listing standards.\textsuperscript{25}

Compensation Discussion & Analysis ("CD&A") and compensation committee report\textsuperscript{26}; other executive compensation matters. The committee will review and discuss with management the company’s CD&A prepared in accordance with SEC regulations and determine whether to recommend to the board that the CD&A be included in the company’s proxy statement and annual report on Form 10-K. The committee will timely prepare and approve a compensation committee report on executive compensation for inclusion in the company’s proxy statement and Form 10-K as required by the SEC. The committee will also oversee the company’s compliance with SEC rules and regulations and NASDAQ listing standards, as applicable, regarding stockholder advisory votes with respect to certain executive compensation matters, including non-binding advisory votes on executive compensation, the frequency of such votes and on “golden parachute” payments\textsuperscript{27} and clawback policies.\textsuperscript{28}

\textsuperscript{25} NASDAQ Marketplace Rule 5635(c) and IM 5635-1 require that most plans and material amendments thereto must be approved by stockholders. For plans and amendments that are not required to be approved by stockholders, these listing standards require as a general matter the approval of the compensation committee or a majority of independent directors.

\textsuperscript{26} See Item 407(e)(5) of Regulation S-K.

\textsuperscript{27} Considered a best practice for say-on-pay matters.

\textsuperscript{28} On July 1, 2015, pursuant to the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC released proposed rules directing the national securities exchanges and associations to establish listing standards requiring issuers to adopt and comply with written policies for recovery of incentive-based compensation based upon accounting restatements over a period of three years and to disclose those recovery policies in
[Stockholder proposals. The committee will review stockholder proposals pertaining to compensation matters and recommend responses to such proposals to the board.]\(^{29}\)

**Risk oversight.** At least annually, the committee will review incentive compensation arrangements to confirm that incentive pay arrangements do not create or encourage unnecessary risk-taking\(^ {30}\) and report the results thereof to the full board.

**Charter; annual performance review.** The committee will review and reassess the adequacy of this charter at least annually and recommend to the board amendments as the committee deems appropriate.\(^ {31}\) The committee will also evaluate its own performance as a committee on an annual basis and report the results thereof to the full board.\(^ {32}\)

**Other functions and reporting.** The committee may perform any other activities consistent with this charter, the company’s corporate governance documents and applicable listing standards, laws and regulations as the committee or the board considers appropriate. The accordance with SEC rules (commonly known as “clawback of executive compensation”). The proposed rules can be found at [http://www.sec.gov/rules/proposed/2015/33-9861.pdf](http://www.sec.gov/rules/proposed/2015/33-9861.pdf). As of the date of these materials, final rules have not been adopted. However, compensation committees may wish to add overseeing clawback policies to their duties and responsibilities. Please consult with the Baker & McKenzie attorney with whom you work with for further guidance.

\(^ {29}\) Consider adding this clause if the board prefers to have stockholder proposals pertaining to compensation matters first reviewed and considered by the committee. Having the committee that regularly reviews and considers company compensation matters make recommendations on stockholder proposals in this area can expedite the review process when a company receives a proposal. Our form of Nominating and Corporate Governance Committee Charter provides for that committee first reviewing stockholder proposals on all other matters.

\(^ {30}\) The SEC’s proxy disclosure rules require disclosure about the relationship between a company’s overall compensation policies and practices and material risks arising from the compensation policies.

\(^ {31}\) See NASDAQ Marketplace Rule 5605(d)(1).

\(^ {32}\) Although NASDAQ listing standards do not require this, it is considered a best practice and is analogous to the NYSE requirement.
committee will report regularly to the full board the major items covered at each of its meetings.  

General

Committee access and information. The committee is at all times authorized to have direct, independent and confidential access to the company’s other directors, management and personnel to carry out the committee’s purposes. The committee is authorized to conduct or authorize investigations into any matters relating to the purposes, duties or responsibilities of the committee. The committee is authorized to obtain at the company’s expense compensation surveys, reports on the design and implementation of compensation programs for the company’s directors, officers and employees, and other data and documentation as the committee considers appropriate.

Committee advisers and funding. The committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, legal counsel or other adviser. The committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, legal counsel and other adviser retained by the committee. The company must provide for appropriate funding, as determined by the committee, for payment of reasonable compensation to a compensation consultant, legal counsel or any other adviser retained by the committee.

Adviser independence evaluation. The committee may select, or receive advice from, a compensation consultant, legal counsel (other than in-house legal counsel) or other adviser only after taking into

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33 Considered a best practice; derived from NYSE practice which is based on commentary to Listed Company Manual §303A.05.
34 Ensure consistency with bylaws and corporate governance guidelines.
36 Prior to selecting an adviser, the committee must first take into consideration these enumerated factors that bear on the independence of such adviser. Unlike committee members, however, committee advisers are not required to be independent.
consideration the following: (i) the provision of other services to the company by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from the company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the committee; (v) any stock of the company owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the company as well as any other factors required by applicable exchanges and/or the Exchange Act and corresponding rules that may be amended from time to time.

Committee Structure and Operations. The committee will fix its own rules of procedure and shall meet as provided by such rules or by resolution of the committee. The committee may establish sub-
committees consisting of one or more members to carry out such duties as the committee may assign.  

Reliance on others. Nothing in this charter is intended to preclude or impair the protection provided in Section 141(e) of the Delaware General Corporation Law for good faith reliance by members of the committee on reports or other information provided by others.

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38 Providing for flexibility to establish sub-committees is considered good practice; derived from NYSE practice which is based on commentary to Listed Company Manual §303A.05(b)(iii). Ensure consistency with other governance documents.

39 Make changes as necessary for companies that are not incorporated in Delaware.
Annotated Form of Lead Independent Director Policy

Various parties in the corporate governance field have been advocating for the separation of the CEO and board chairperson roles. Companies are under increasing pressure to separate the two roles, and some companies have elected to do so. However, most practitioners generally believe that there is no single “one-size fits all” approach to corporate governance leadership structure that suits every company and agree that appointing a lead independent director has many benefits when there is a combined CEO and board chairperson position. If adopting a lead independent director policy, also review the company’s corporate governance guidelines, bylaws and other governance documents as well as governing state corporation law and listing standards to ensure consistency between the terms of this form policy and such documents and regulatory requirements, and customize as necessary. Companies may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of their larger institutional stockholders, which are usually published and available on their websites.

This form of lead independent director policy is not intended as a substitute for appropriate review or analysis of the specific facts and circumstances applicable to the governance structure under consideration. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual market’s listing standards, which this document does not address. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.
Note: It is always recommended to monitor the latest SEC Compliance and Disclosure Interpretations related to corporate governance and disclosure available on the SEC’s website at http://www.sec.gov/divisions/corpfin/cfguidance.shtml.
In the event that the Chairperson of the board of directors of [Company Name] (“Chairperson”) is not an independent director, the board considers it to be appropriate and useful to designate an independent director to serve in a lead capacity (“Lead Director”) to coordinate the activities of the other independent directors and to perform such other duties and responsibilities as the board may determine from time to time. The board supports the role of Lead Director as an enhancement of, rather than a substitution for, the responsible functioning of each director in carrying out his or her fiduciary obligations to the company and its stockholders.

The independent directors will review and assess the adequacy of this policy annually and recommend any proposed changes to the full board.

Qualifications and appointment

*Independence.* The Lead Director must have been determined by the board to be independent as defined in the [NYSE] [NASDAQ] listing standards, as they may be amended from time to time.

*Advisory capacity.* The Lead Director will be available to effectively work closely with and in an advisory capacity to the Chairperson. The

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1 Considered best practice to include these references; however, ensure this language is in line with the governance structure of the company.
Lead Director will also help ensure the effectiveness of the board and that it operates independently of management.

Appointment/removal. [Annually] [Every [number] years]

The independent directors will appoint a Lead Director by a majority vote. [Although elected annually, the Lead Director is generally expected to serve for more than one year and may be re-elected at the end of his or her term by a majority vote of the independent directors.] The Lead

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2 Institutional Shareholder Services (“ISS”) US Proxy Voting Summary Guidelines for 2015 (“2015 Guidelines”) provide that ISS generally recommends voting “for” stockholder proposals requiring that the chairperson’s position be filled by an independent director, taking into consideration the scope of the proposal, the current board leadership structure, the company’s governance structure and practices, the company’s performance and any other relevant factors. The 2015 Guidelines go on to provide that, “Under the review of the company’s board leadership structure, ISS may support the proposal under the following scenarios absent a compelling rationale: the presence of an executive or non-independent chair in addition to the CEO; a recent recombination of the role of CEO and chair; and/or departure from a structure with an independent chair. ISS will also consider any recent transitions in board leadership and the effect such transitions may have on independent board leadership as well as the designation of a lead director role. When considering the governance structure, ISS will consider the overall independence of the board, the independence of key committees, the establishment of governance guidelines, board tenure and its relationship to CEO tenure, and any other factors that may be relevant. Any concerns about a company’s governance structure will weigh in favor of support for the proposal. The review of the company’s governance practices may include, but is not limited to poor compensation practices, material failures of governance and risk oversight, related-party transactions or other issues putting director independence at risk, corporate or management scandals, and actions by management or the board with potential or realized negative impact on shareholders. Any such practices may suggest a need for more independent oversight at the company thus warranting support of the proposal. ISS’ performance assessment will generally consider one-, three-, and five-year TSR compared to the company’s peers and the market as a whole. While poor performance will weigh in favor of the adoption of an independent chair policy, strong performance over the long-term will be considered a mitigating factor when determining whether the proposed leadership change warrants support.”

Prior to 2015, ISS guidelines historically provided that a designated lead independent director would be viewed favorably in voting “against” independent chair stockholder proposals if the lead director served for a minimum of one year in such capacity and had certain duties. As ISS may still consider these factors in analyzing a company’s lead director role and governance structure, companies should still consider appointing the lead director for a minimum term of one year but can appoint for a longer term if they desire (generally such longer term appointments are for two to three years for continuity of the role).

As of the date of these materials, ISS had not yet released its US Proxy Voting Summary Guidelines for the upcoming 2016 proxy season. Companies should continue to monitor ISS policies at http://www.issgovernance.com/.

3 Include if the company will elect a Lead Director annually; see footnote 2 above.
Director may be removed or replaced in his or her capacity as such at any time with or without cause by a majority vote of the independent directors.

Absence of Lead Director. If the Lead Director is not present at any meeting of the board, a majority of the independent directors present shall select an independent director to act as Lead Director for the purpose and duration of such meeting.4

Duties and responsibilities

The duties and responsibilities of the Lead Director include, but are not limited to, the following:

Preside over executive sessions. The Lead Director will preside at all meetings of the board at which the Chairperson is not present, including all meetings and executive sessions of the independent directors.5 Additionally, the Lead Director has the authority to call such meetings and executive sessions of the independent directors as he/she deems necessary.

Serve as liaison to the Chairperson. The Lead Director will serve as the principal liaison between the independent directors and the Chairperson. The Lead Director will be available to discuss any concerns about the board or [Company Name] the other independent directors may have and to relay those concerns, where appropriate, to the Chairperson.

Approve board information, agendas and meeting schedules. The Lead Director will approve the information sent to the board, including the quality, quantity, appropriateness and timeliness of such information. The Lead Director [, in consultation with the CEO,]6 will

4 Ensure this is consistent with the company’s corporate governance guidelines, bylaws and other governance documents.
5 See NYSE Listed Company Manual §303A.03.
6 Consider including the bracketed language if the board prefers that meeting schedules and
approve the scheduling of board meetings as well as the agenda for each board meeting, assuring there is sufficient time for discussion of all agenda items. The Lead Director will also approve the agenda for each executive session of the independent directors.

The Lead Director may also provide guidance on the orientation process for new directors.

*Interview director candidates.* The Lead Director may interview director candidates along with the nominating and corporate governance committee.7

*Communicate with stockholders.* As requested [and deemed appropriate by the board]8, the Lead Director will be available for [consultation and direct]9 communication with stockholders and other stakeholders.

*Retain advisers and consultants.* The Lead Director may approve and coordinate the retention of outside advisers and consultants who report

agendas be jointly done by the Chairperson and the Lead Director. Note however that prior to 2015, historically ISS US Proxy Voting Guidelines have required that the duties of the lead director include “approves meeting agendas for the board; approves meeting schedules to assure that there is sufficient time for discussion of all agenda items” without any CEO consultation references.

Also, review the company’s corporate governance guidelines to see if modification is required to references regarding establishing meeting agendas.

7 Ensure this is consistent with the company’s corporate governance guidelines, nominating and corporate governance committee charter and other governance documents.

8 Consider including this language to ensure that the Lead Director only has to respond to appropriate stockholder communication matters. Note however that prior to 2015, historically ISS US Proxy Voting Guidelines have provided that lead director duties should include “if requested by major shareholders, ensures that he or she is available for consultation and direct communication” without any qualification language to such duty.

9 As noted above, historically ISS US Proxy Voting Guidelines have provided that lead director duties should include “if requested by major shareholders, ensures that he or she is available for consultation and direct communication.” Consider the board’s preferences for communications with stockholders and the negotiability of the wording used in this section as well when drafting.
directly to the independent directors, except as otherwise required by applicable law or the [NYSE] [NASDAQ] listing standards.\textsuperscript{10}

\textit{Serve as the board Chairperson on an interim basis.} The Lead Director will serve as the Chairperson on an interim basis in the event of the death or disability of the Chairperson or if circumstances arise in which the Chairperson may have an actual or perceived conflict of interest.\textsuperscript{11}

\textit{Perform other duties as requested.} The Lead Director will perform such other duties as the board may from time to time delegate in order to assist the board in the fulfillment of its responsibilities.

\textit{Consult with committee chairpersons.} In performing the duties described above, the Lead Director is expected to consult with the chairpersons of the appropriate board committees as needed and solicit their participation in order to avoid diluting the authority or responsibilities of such committee chairpersons.

\textsuperscript{10} Ensure this is consistent with the company’s corporate governance guidelines and committee charters.

\textsuperscript{11} Ensure this is consistent with the company’s corporate governance guidelines, bylaws and other governance documents.
Annotated Form of US Public Company Bylaws (Delaware Corporation)

This form of bylaws for a US public company that is a Delaware corporation is designed to comply with SEC rules on corporate governance\(^1\) and NYSE and NASDAQ listing standards and to reflect what we consider as best practice. Companies may also want to consider the policies and proxy voting guidelines of the leading proxy advisory firms such as Institutional Shareholder Services and Glass Lewis as well as the proxy voting policies of their larger institutional stockholders, which are usually published and available on their websites.

Key Points About This Form of Public Company Bylaws

Proxy Access

Following passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC implemented universal proxy access regulations to afford stockholders a greater role in the nomination of corporate directors. At the same time, the SEC amended Exchange Act Rule 14a-8(i)(8) to narrow the so-called “election exclusion” for stockholder proposals that must be included in a public company’s proxy materials. Subsequently, a federal district court struck down the SEC’s universal proxy access rules but did not alter the SEC’s amendments to the “election exclusion.”

Under the amendments, stockholders may now submit proposals that seek to establish a procedure in a company’s governing documents for the inclusion of one or more stockholder director nominees in a company’s proxy materials. The proposals may be in the form of a bylaw amendment\(^2\) or a request to amend the company’s governing documents for this purpose. Prior to the rule change, a company could exclude proposals relating to the election of directors. Now, a

\(^1\) See Regulation S-K Item 407.

\(^2\) If permitted by state law, the bylaw amendment may be binding.
company must include such a stockholder proposal as long as the procedural requirements of Rule 14a-8 are met. However, a company may continue to exclude a stockholder proposal that would disqualify a nominee standing for election or would remove a director from office before the expiration of his or her term; question the competence, business judgment or character of a nominee or incumbent director; seek to include a specific nominee in the company’s proxy materials; or otherwise could affect the outcome of the upcoming election of directors.

Over the past several proxy seasons, stockholder proposals have been submitted in increasing numbers requesting public companies to amend their bylaws to provide for proxy access at varying ownership threshold levels. On January 16, 2015, the SEC released two statements: (i) one from Chair White directing the staff to review Exchange Act Rule 14a-8(i)(9) on the exclusion of a stockholder proposal conflicting with a management proposal, and (ii) one from the staff indicating that in light of the direction from Chair White, they would no longer be expressing any views on the application of Rule 14a-8(i)(9) during the 2015 proxy season. The statements are available at http://www.sec.gov/news/statements?speaker-typeahead-bottom%5Bquery%5D=&speaker=&year=2015. Exchange Act Rule 14a-8(i)(9) states that one basis for a company to exclude a stockholder proposal is if the stockholder proposal “directly conflicts with one of the company’s own proposals to be submitted to stockholders at the same meeting.” These announcements came after concerns arose with respect to the proper scope and application of Rule 14a-8(i)(9) in a number of no-action requests seeking to exclude “proxy access” stockholder proposals. The staff had granted no-action relief in December 2014, permitting the requesting company to exclude a proxy access stockholder proposal from its 2015 proxy materials because it would conflict with a company-sponsored proxy access bylaw amendment to be voted on at the same meeting. The SEC also issued a reconsideration letter on the prior no-action relief granted, which is available at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiecheveddenrecon011615-14a8.pdf.
After completing its review, on October 22, 2015, the SEC issued Staff Legal Bulletin (SLB) No. 14H (available at http://www.sec.gov/interps/legal/cfslb14h.htm), providing guidance on the scope and application of Rule 14a-8(i)(9) going forward. The SEC’s guidance provides that, “After reviewing the history of Rule 14a-8(i)(9) and based on our understanding of the rule’s intended purpose, we believe that any assessment of whether a proposal is excludable under this basis should focus on whether there is a direct conflict between the management and shareholder proposals. For this purpose, we believe that a direct conflict would exist if a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal. While this articulation may be a higher burden for some companies seeking to exclude a proposal to meet than had been the case under our previous formulation, we believe it is most consistent with the history of the rule and more appropriately focuses on whether a reasonable shareholder could vote favorably on both proposals or whether they are, in essence, mutually exclusive proposals. In considering no-action requests under Rule 14a-8(i)(9) going forward, we will focus on whether a reasonable shareholder could logically vote for both proposals.” The SLB provides examples of “directly conflicting” proposals. The new guidance is expected to lead to Rule 14a-8(i)(9) being used less frequently as an exclusion basis going forward.

Furthermore, Sections 112 and 113 of the Delaware General Corporation Law (“DGCL”) provide for proxy access and reimbursement of proxy expenses. These provisions constitute “enabling” rather than “mandatory” legislation and consideration should be given if the company desires to provide greater access to the company’s proxy materials for activist stockholders. Under Section 112, the bylaws may provide that, if the corporation solicits proxies in regard to an election of directors, then the corporation must include in its proxy materials nominees of stockholders in addition to nominees of the board. Section 112 makes clear that the bylaws may establish any lawful condition to such proxy access right and identifies a non-exclusive list of conditions that the bylaws may impose, such as
minimum levels of stock ownership. Under Section 113, the bylaws may provide for the corporation to reimburse proxy solicitation expenses incurred by a stockholder. Section 113 provides a non-exclusive list of conditions for such reimbursement.

As proxy access is expected to be a continuing area of focus in upcoming proxy seasons, we recommend that you review and continue to monitor developments in this area, including the proxy advisory firms’ and large institutional stockholders’ policies and bylaw provisions that are being advanced/adopted in this area. Because proxy access provisions could have the likely effect of encouraging activist stockholders to disrupt the long-term strategic plans of the board at the expense of short-term goals, such provisions may not be suitable for many public companies, and the advantages and disadvantages should be carefully considered before they are included in a public company’s bylaws. Boards should be educated in advance about proxy access and potential actions that can be taken so that if a proxy access stockholder proposal is received, proactive action can be taken quickly. Boards should also consider the merits of developing a proxy access bylaw to put “on the shelf.” Advance preparation in this area can be valuable with respect to information flow and action plans as well as providing the ability to quickly adopt a proxy access bylaw that has already been carefully considered, and if timely, seeking SEC no-action relief to exclude a stockholder proposal on the grounds of substantial implementation under Exchange Act Rule 14a-8(i)(10). This form of US public company bylaws includes a sample form proxy access provision; however, this provision should be carefully reviewed and considered with the Baker & McKenzie attorney with whom you work in light of all the factors discussed above so that the right form of bylaw is adopted when necessary given the company’s specific facts and circumstances.

Exclusive Forum Provisions

This form of US public company bylaws includes an exclusive forum selection provision. These provisions are intended to address the problem of duplicative stockholder litigation by protecting companies
from having to defend stockholder lawsuits being brought in multiple jurisdictions in the areas of derivative suits, fiduciary duty suits, claims under the DGCL and other claims regarding internal affairs of the corporation. Such provisions do not eliminate any stockholder causes of action or prevent stockholders from bringing claims but rather consolidate these types of litigation to a single jurisdiction. In June 2013, the Delaware Court of Chancery held that boards of directors of Delaware corporations may validly adopt such provisions.3 Effective August 1, 2015, the DGCL was amended to add new Section 115 codifying the Court of Chancery’s decision in Boilermakers, thereby expressly authorizing by statute a charter provision or bylaw to select either the Delaware courts, or the Delaware courts and one or more other forums as the exclusive jurisdiction(s) for “intra-corporate claims.” Section 115 defines “intra-corporate claims” as: claims, including claims in the right of the

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3 See Boilermakers Local 154 v. Chevron, C.A. No. 7220-CS (Del. Ch. June 25, 2013) at http://courts.delaware.gov/opinions/download.aspx?ID=190990. It remains to be seen whether courts in jurisdictions outside of Delaware will enforce or place limits on the enforceability of a board-adopted forum selection bylaw provision if a stockholder seeks to pursue a non-Delaware forum for litigation (e.g., (1) in 2011 in Galaviz v. Berg, 763 F. Supp 2d 1170 (N.D. Cal. 2011), the US District Court for the Northern District of California refused to enforce an exclusive forum bylaw citing, among other reasons, the absence of stockholder approval and alleged wrongdoing prior to adoption of the bylaw, but in 2014 in Groen v. Safeway Inc., No. RG14716641 (Cal. Super. Ct. Alameda County May 14, 2014), the California court declined to follow Galaviz and instead held that an exclusive forum bylaw adopted by the company was enforceable and that plaintiffs had not shown why enforcement of the provision might be unreasonable in the case and the record did not support an argument that the provision had been adopted after any wrongdoing; and (2) in 2014 in Roberts v. TriQuint SemiConductor, Inc., No. 1402-02441 (Or. Cir. Ct. Aug. 14, 2014), the court in Oregon held that the board’s adoption of an exclusive forum bylaw provision in connection with its approval of a merger transaction was “inequitable” because it enacted the bylaw in anticipation of the type of lawsuit that was filed). See also, City of Providence v. First Citizens Bancshares, Inc., et al., Consol. C.A. No. 9795-CB (September 2014), in which the Delaware Court of Chancery granted a motion to dismiss a challenge to a bylaw adopted by the board of directors of First Citizens Bancshares, Inc., a company incorporated in Delaware and based in North Carolina, that required, to the extent permitted by law, certain intra-corporate claims to be brought exclusively in the United States District Court for the Eastern District of North Carolina, or, if that court lacked jurisdiction, then in any North Carolina state court that possessed jurisdiction. The Delaware court held that the logic and reasoning of Boilermakers Local 154 v. Chevron, compelled the decision upholding the facial validity of the exclusive forum bylaw, notwithstanding the choice of a non-Delaware forum.
corporation (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery. In addition, Section 115 also prohibits a corporation from adopting a charter or bylaw provision selecting the courts in a different state (or an arbitral forum) as the exclusive forum for intra-corporate claims, if that provision would also preclude litigating those claims in the Delaware courts.

Companies seeking the benefits of exclusive forum bylaws should consider carefully the timing of their adoption. Several courts have noted the potential for additional questioning if the bylaws are adopted in anticipation of impending litigation or after a dispute has arisen or appear to be adopted for an improper purpose and have suggested that such bylaws should only be adopted on a “clear day.”

Additionally, of note is that Institutional Shareholder Services’ (“ISS”) voting policy guideline, as of the date of these materials, with regard to bylaws which impact stockholders’ litigation rights is to vote on a case-by-case approach, taking into account factors such as:

- the company’s stated rationale for adopting such a provision;
- disclosure of past harm from stockholder lawsuits in which plaintiffs were unsuccessful or stockholder lawsuits outside the jurisdiction of incorporation;
- the breadth of application of the bylaw, including the types of lawsuits to which it would apply and the definition of key terms; and
- governance features such as stockholders’ ability to repeal the provision at a later date (including the vote standard applied when stockholders attempt to amend the bylaws) and their ability to hold directors accountable through annual director elections and a majority vote standard in uncontested elections.

The policy further provides that the board’s unilateral adoption of bylaw provisions which affect stockholders’ litigation rights will be
evaluated under ISS’ policy on unilateral bylaw/charter amendments, which currently provides to generally vote against or withhold from directors individually, committee members or the entire board (except new nominees, to be considered case-by-case) if the board amends the company’s bylaws or charter without stockholder approval in a manner that materially diminishes stockholders’ rights or that could adversely impact stockholders, considering certain factors, as applicable, such as the board’s rationale for adoption, the level of impairment of stockholders’ rights caused by the amendment and the timing of the board’s amendment, among others (see http://www.issgovernance.com/policy-gateway/2015-policy-information/).

As of the date of these materials, Glass Lewis will recommend that stockholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision unless the company: (1) provides a compelling argument on why the provision would directly benefit stockholders, (2) provides evidence of abuse of legal process in other, non-favored jurisdictions, (3) narrowly tailors such provision to the risks involved, and (4) maintains a strong record of good corporate governance practices. Glass Lewis also states in its guidelines that it will recommend that stockholders vote against a company’s governance committee chair, if during the past year, the board adopted an exclusive forum bylaw without stockholder approval (see http://www.glasslewis.com/resource/guidelines/). Additionally, the policies of certain stockholders and stockholder groups, including the AFL-CIO and the Council of Institutional Investors, urge against adopting charter or bylaw exclusive forum provisions. It remains to be seen if any of these groups will amend their policies now that Delaware has codified the Boilermakers decision. The 2016 proxy season policy updates for these groups should be reviewed.

Fee-Shifting Provisions

A fee-shifting bylaw provides a corporation with the opportunity to recover expenses incurred by the defending corporation as well as its officers, directors and/or their affiliates (including but not limited to
legal fees) against a stockholder pursuing intra-corporate litigation if the stockholder proves unsuccessful in the litigation. This type of bylaw garnered attention following a decision by the Delaware Supreme Court in May 2014 concluding that a fee-shifting bylaw adopted by a *non-stock corporation* was facially valid. Effective August 1, 2015, the DGCL was amended to prohibit *stock corporations* from adopting fee-shifting provisions with respect to “intra-corporate claims” as defined in new Section 115 discussed above under “Exclusive Forum Provisions.” New Section 102(f) and amended Section 109(b) of the DGCL now prohibit the inclusion of fee-shifting provisions in the charter or bylaws of a stock corporation.

**Advance Notice Provisions**

This form of US public company bylaws includes second generation advance notice provisions. Advance notice bylaws have become more customary in recent years and should be strongly considered to give the board and the nominating committee sufficient time to properly evaluate stockholder proposals before making a recommendation to the stockholders.

**Majority Voting**

Stockholder activism has led to most companies adopting majority voting requirements for directors in uncontested elections. This form of US public company bylaws includes a majority voting standard for uncontested director elections, but alternative language for a plurality voting standard for elections has been included as a footnote.

**Abstentions and Broker Non-Votes**

An abstention occurs when a stockholder who is present at a meeting (in person or by proxy) and entitled to vote voluntarily does not vote on a matter. Typically, an abstention is counted for determining whether or not a quorum is present. The impact of abstentions on

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voting results depends on the type of vote required for the proposal at hand. Generally, state law of the company’s jurisdiction or the company’s charter or bylaws may specify how abstentions will be treated.

A broker non-vote occurs if the beneficial owner of the shares fails to return voting instructions to the broker, or leaves some matters blank on the returned voting card. Brokers can then use discretionary voting to vote the proxy on routine matters and leave the other non-routine matters for which instructions were not received blank. Typically, a broker non-vote is counted for determining whether or not a quorum is present. As with abstentions, the impact of broker non-votes on voting results depends on the type of vote required for the proposal at hand. Generally, state law of the company’s jurisdiction or the company’s charter or bylaws may specify how abstentions will be treated.

Delaware corporation law does not directly address broker non-votes but their effect has been addressed by the Delaware Supreme Court.5

A company should also consider how its listing exchange treats abstentions and broker non-votes. This form of US public company bylaws does not attempt to further define how abstentions and broker non-votes are treated.

For more information on the counting of these types of votes towards proposals, see our Routine Annual Meeting Proxy Statement Checklist.

Bifurcated Record Dates

This form of US public company bylaws does not provide for bifurcated record dates for notice and voting at a stockholder meeting as permitted by Section 213 of the DGCL.

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5 See Berlin v. Emerald Partners, 552 A.2d 482 (Del. 1988); Delaware corporations will not include broker non-votes in the denominator for purposes of determining whether a proposal has received a majority of the shares “present and entitled to vote.”
This form of US public company bylaws is designed primarily for use by US listed Delaware corporations that are not the types of entities that receive special treatment under the applicable SEC rules and exchange standards, such as controlled companies, smaller reporting companies, foreign private issuers or companies listing only preferred or debt securities. Although it may be a useful resource for other types of entities, including unlisted companies, it is not designed to be used as a model guideline for such entities. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual markets’ listing standards, which this document does not address.

We recommend that companies review this form of US public company bylaws with our forms of corporate governance guidelines and committee charters. Because corporate governance practices vary widely from company to company, this form of US public company bylaws should be customized as necessary.

This form of US public company bylaws is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.

Note: It is always recommended to monitor the latest SEC Compliance and Disclosure Interpretations related to corporate governance available on the SEC’s website at http://www.sec.gov/divisions/corpfin/cfguidance.shtml.
BYLAWS
OF
[NAME OF DELAWARE CORPORATION]
(the “Corporation”)

[Adopted] [Amended and restated] as of ______, 20__
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Article I
Meetings of Stockholders

Section 1. Annual Meeting.

(a) An annual meeting of the stockholders, for the election of directors to succeed those whose terms expire and for the transaction of such other business as may properly come before the meeting, shall be held at such place within or without the State of Delaware or solely by means of remote communication pursuant to Section 211(a)(2) of the Delaware General Corporation Law, on such date, and at such time as may be designated by the Board of Directors.

(b) Nominations of persons for election to the Board of Directors and the proposal of business to be transacted by the stockholders may

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See Section 9 in this Article I for a sample proxy access bylaw and footnotes 17-19 for a discussion on the factors to be considered. If a proxy access bylaw is adopted, paragraphs (b) and (d) of this Section 1 should be revised to read as follows:

(b) Except as provided in Section 9 of this Article I, nominations of persons for election to the Board of Directors and the proposal of business to be transacted by the stockholders may only be made at an annual meeting of stockholders (i) pursuant to the Corporation’s notice and proxy materials for such meeting, (ii) by or at the direction of the Board of Directors, or (iii) by any stockholder of record of the Corporation at the time of the giving of the notice required in Section 1(c) who is entitled to vote at the meeting and who has complied with the notice procedures set forth in this Section 1. Except for proposals properly made in accordance with Rule 14a-8 under the Securities Exchange Act of 1934, as amended (such act, and the rules and regulations promulgated thereunder, the “Exchange Act”), and included in the notice of meeting given by or at the direction of the Board of Directors and except as provided in Section 9 of this Article I, the foregoing clause (iii) shall be the exclusive means for a stockholder to make nominations of directors or propose business to be brought before an annual meeting of stockholders.

For nominations (other than nominations made pursuant to Section 9 of this Article I, with respect to which nominations a Proxy Access Nomination Notice must be delivered to the Corporation pursuant to Section 9(b) of Article I of these Bylaws and the other provisions of Section 9 of Article I must otherwise be satisfied) or other business to be properly brought before an annual meeting of stockholders by a stockholder pursuant to clause (iii) above of this Section 1(b), (i) the stockholder of record must have given timely notice thereof in writing to the Secretary of the Corporation, (ii) the stockholder of record must provide to the Secretary of the Corporation any updates or supplements to such notice at the times and in the forms specified in this Section 1, (iii) any such business must be a proper matter for stockholder action under the Corporation’s Certificate of Incorporation, these Bylaws and Delaware law, and (iv) the
only be made at an annual meeting of stockholders (i) pursuant to the Corporation’s notice and proxy materials for such meeting, (ii) by or at the direction of the Board of Directors, or (iii) by any stockholder of record of the Corporation at the time of the giving of the notice required in Section 1(c) who is entitled to vote at the meeting and who has complied with the notice procedures set forth in the Solicitation Statement (as defined in Section 1(e)(iii)(D)). To be timely, a notice by a stockholder of record must be received by the Secretary by the close of business at the principal executive offices of the Corporation not less than 90 or more than 120 days prior to the one-year anniversary of the date of the preceding year’s annual meeting of stockholders; provided, however, that, subject to the last sentence of this Section 1(b), if the meeting is convened more than 30 days prior to or delayed by more than 60 days after the anniversary of the preceding year’s annual meeting, or if no annual meeting was held in the preceding year, notice by the stockholder of record (other than a Proxy Access Nomination Notice, which must be delivered to the Corporation pursuant to Section 9(b) of this Article I) to be timely must be so received not earlier than the close of business on the 120th day prior to the date of the annual meeting and not later than the close of business on the later of (i) the 90th day before such annual meeting or (ii) if the first public announcement of the date of such annual meeting is less than 100 days prior to the date of such annual meeting, the 10th day following the day on which public announcement of the date of such meeting is first made. Notwithstanding anything in the preceding sentence to the contrary, in the event that the number of directors to be elected to the Board of Directors is increased and there has been no public announcement naming all of the nominees for director or indicating the increase in the size of the Board of Directors made by the Corporation at least 10 days before the last day a stockholder of record may deliver a notice of nomination in accordance with the preceding sentence, a notice by a stockholder of record required by this Section 1 shall also be considered timely, but only with respect to nominees for any new positions created by such increase in the number of directors, if it shall be received by the Secretary at the principal executive offices of the Corporation not later than the close of business on the 10th day following the day on which such public announcement is first made by the Corporation. In no event shall an adjournment, or postponement of an annual meeting for which notice has been given, commence a new time period (or extend any time period) for the giving of a notice by a stockholder of record.

(d) A person shall not be eligible for election or re-election as a director at an annual meeting unless (i) the person is nominated by a stockholder of record in accordance with Section 1(b)(iii) or Section 9 of this Article I; or (ii) the person is nominated by or at the direction of the Board of Directors or a duly authorized committee thereof. Only such business shall be conducted at an annual meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this section. The chair of the meeting shall have the power and the duty to determine whether a nomination or any business proposed to be brought before the meeting has been made in accordance with the procedures set forth in these Bylaws and, if any proposed nomination or business is not in compliance with these Bylaws, to declare that such proposed business or nomination shall not be presented for stockholder action at the meeting and shall be disregarded.
forth in this Section 1. For the avoidance of doubt, the foregoing clause (iii) shall be the exclusive means for a stockholder to make nominations or propose business (other than [non-binding] business required to be included in the Corporation’s proxy materials pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended (such act, and the rules and regulations promulgated thereunder, the “Exchange Act”)) at an annual meeting of stockholders.

For nominations or business to be properly brought before an annual meeting by a stockholder of record pursuant to clause (iii) above of this Section 1(b), (i) the stockholder of record must have given timely notice thereof in writing to the Secretary of the Corporation, (ii) the stockholder of record must provide to the Secretary of the Corporation any updates or supplements to such notice at the times and in the forms specified in this Section 1, (iii) any such business must be a proper matter for stockholder action under the Corporation’s Certificate of Incorporation, these Bylaws and Delaware law, and (iv) the stockholder of record and the beneficial owner or owners, if any, on whose behalf any such proposal or nomination is made, must have acted in accordance with the representations set forth in the Solicitation Statement (as defined in Section 1(c)(iii)(D)). To be timely, a notice by a stockholder of record must be received by the Secretary by the close of business at the principal executive offices of the Corporation not less than 90 or more than 120 days prior to the one-year anniversary of the date of the preceding year’s annual meeting.
meeting of stockholders;\textsuperscript{4} provided, however, that, subject to the last sentence of this Section 1(b), if the meeting is convened more than 30 days prior to or delayed by more than 60 days after the anniversary of the preceding year’s annual meeting, or if no annual meeting was held in the preceding year, notice by the stockholder of record to be timely must be so received not earlier than the close of business on the 120th day prior to the date of the annual meeting and not later than the close of business on the later of (i) the 90th day before such annual meeting or (ii) if the first public announcement of the date of such annual meeting is less than 100 days prior to the date of such annual meeting, the 10th day following the day on which public announcement of the date of such meeting is first made. Notwithstanding anything in the preceding sentence to the contrary, in the event that the number of directors to be elected to the Board of Directors is increased and there has been no public announcement naming all of the nominees for director or indicating the increase in the size of the Board of Directors made by the Corporation at least 10 days before the last day a stockholder of record may deliver a notice of nomination in accordance with the preceding sentence, a notice by a stockholder of record required by this Section 1 shall also be considered timely, but only with respect to nominees for any new positions created by such increase in the number of directors, if it shall be received by the Secretary at the principal executive offices of the Corporation not later than the close of business on the 10th day following the day on which such public announcement is first made by the Corporation. In no event shall an adjournment, or postponement of an annual meeting of stockholders for which notice has been given, commence a new

\textsuperscript{4} This time period is consistent with the recommendations of other leading US public M&A law firms. Generally, a public company would like this deadline to be as early as is reasonable. A variation may be to base the deadline off of the anniversary of last year’s proxy mailing date. Rule 14a-8 proposals are due no later than 120 days prior to the anniversary of last year’s proxy mailing date. See also footnote 18 regarding proxy access nominee deadlines.
time period (or extend any time period) for the giving of a notice by a stockholder of record.\(^5\)

(c) Such notice by a stockholder of record shall set forth:

(i) If such notice pertains to the nomination of directors, as to each person whom the stockholder of record proposes to nominate for election or re-election as a director: (A) all information relating to such person as would be required to be disclosed in solicitations of proxies for the election of such nominees as directors pursuant to Regulation 14A under the Exchange Act; (B) such person’s written consent to serve as a director if elected; (C) a description of all direct and indirect compensation or other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among such stockholder of record and beneficial owner or owners, if any, or other person on whose behalf the nomination is made, and their respective affiliates and associates, or other persons acting in concert therewith, on the one hand, and each proposed nominee and his or her respective affiliates and associates or other persons acting in concert therewith, on the other hand, including without limitation all information that would be required to be disclosed pursuant to Rule 404 promulgated under Regulation S-K if the stockholder of record making the nomination and any beneficial owner or owners, if any, or other person on whose behalf the nomination is made, or any affiliate or associate thereof or other person acting in concert therewith, were the “registrant” for purposes of such rule and the nominee were a director or executive officer of such registrant; and (D) a completed and

\(^5\) In certain situations, the directors, in the discharge of their fiduciary duties, may have to consider waiving advance notice provisions if the company’s investment thesis has been changed by the board and stockholders would be denied voting rights to timely effectuate the requisite board changes needed to realign stockholders’ and the company’s investment thesis. See Icahn Partners LP v. Amylin Pharmaceuticals, Inc., C.A. No. 7404-VCN (Del.Ch. Apr. 20, 2012).
signed questionnaire, representation or agreement as may be required by the Corporation pursuant to Section 3 of Article II of these Bylaws. [For purposes of these Bylaws, a person shall be deemed to be acting in concert with another person if such person knowingly acts toward a common goal relating to the management, governance or control of the corporation in parallel with such other person where (A) each person is conscious of the other person’s conduct or intent and this awareness is an element in their decision-making process and (B) at least one additional factor suggests that persons intend to act in parallel, which additional factors may include attending meetings, conducting discussions or making or soliciting invitations to act in parallel.]

(ii) As to any business that the stockholder of record proposes to bring before the meeting: a brief description of such business, the reasons for conducting such business at the meeting, any material interest in such business of such stockholder of record and the beneficial owner or owners, if any, or other persons on whose behalf the proposal is made or acting in concert therewith and a description of all agreements, arrangements and understandings between such stockholder of record and beneficial owner or owners, if any, and any other such person or persons (including their names) in connection with the proposal of such business by such stockholder of record.

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6 In modern takeover practice, an activist strategy is to form “wolf packs” whereby one or two lead activist investors communicate ideas and proposals with respect to the takeover of a company but do not ask for or receive responses indicating agreement in an attempt to avoid becoming a “group” as defined by Section 13(d) of the Exchange Act. Members of the “wolf pack” follow and support the leaders by mimicking the privately discussed strategy but without public disclosure. This provision is intended to provide transparency and accountability for the formation of a “wolf pack” to nominate directors or propose other business at a stockholders’ meeting. This approach, which is reflected in current US public M&A legal commentary, attempts to follow some of the philosophy of antitrust enforcement where there is “conscious parallelism.” This approach is not without criticism as it creates some ambiguity for otherwise well-intentioned stockholders.
(iii) As to (1) the stockholder of record giving the notice and (2) the beneficial owner or owners, if any, or other persons on whose behalf the nomination or proposal is made or acting in concert therewith (each, a “party”):

(A) the name and address of each such party;

(B) (1) the class, series, and number of shares of the Corporation that are owned, directly or indirectly, beneficially and of record by each such party, (2) any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege or providing for a settlement payment or mechanism based on the price of any class or series of shares of the Corporation or with a value derived in whole or in part from the value of any class or series of shares of the Corporation, whether or not such instrument or right shall be subject to settlement in the underlying class or series of capital stock of the Corporation or otherwise (a “Derivative Instrument”) directly or indirectly owned beneficially by each such party, and any other direct or indirect opportunity to profit or share in any profit derived from any increase or decrease in the value of shares of the Corporation, (3) any proxy, contract, arrangement, understanding or relationship pursuant to which any party, either directly or acting in concert with another person or persons, has a right to vote, directly or indirectly, any shares of any security of the Corporation, (4) any short interest or other borrowing arrangement in any security of the Corporation held by each such party (for purposes of this Section 1(c), a person shall be deemed to have a short interest in a security if such person directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has the opportunity to profit or share in any profit derived from any decrease in the value of the subject security), (5) any rights to dividends on the shares of the Corporation owned beneficially directly or
indirectly by each such party that are separated or separable from the underlying shares of the Corporation, (6) any proportionate interest in shares of the Corporation or Derivative Instruments held, directly or indirectly, by a general or limited partnership in which any party is a general partner or, directly or indirectly, beneficially owns an interest in a general partner and (7) any performance-related fees (other than an asset-based fee) that each such party is directly or indirectly entitled to based on any increase or decrease in the value of shares of the Corporation or Derivative Instruments, if any, as of the date of such notice, including without limitation any such interests held by members of each such party’s immediate family sharing the same household (which information set forth in this paragraph shall be supplemented by such stockholder or such beneficial owner or other person, as the case may be, not later than 10 days after the record date for the meeting to disclose such ownership as of the record date);

(C) any other information relating to each such party that would be required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in a contested election pursuant to Section 14 of the Exchange Act (whether or not such party intends to deliver a proxy statement or conduct its own proxy solicitation); and

(D) a statement as to whether or not each such party will deliver a proxy statement and form of proxy to holders of, in the case of a proposal, at least the percentage of voting

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7 It is necessary to clarify that this provision applies whether or not the stockholder is conducting its own proxy solicitation to avoid the result in Jana Master Fund, Ltd. v. CNet Networks, Inc., 2008 WL 660556 (Del. Ch. Mar. 13, 2008) where the court construed the advance notice provision to apply only if the proponent was conducting its own proxy solicitation.
power of all of the shares of capital stock of the Corporation required under applicable law to approve the proposal or, in the case of a nomination or nominations for election as directors, at least the percentage of voting power of all of the shares of capital stock of the Corporation reasonably believed by the stockholder of record or beneficial owner or owners, as the case may be, to be sufficient to elect the persons proposed to be nominated by the stockholder of record (such statement, a “Solicitation Statement”).

(iv) A stockholder of record providing notice of a nomination of director or other business proposed to be brought before a meeting shall further update and supplement such notice, if necessary, so that the information provided or required to be provided in such notice pursuant to this Section 1 shall be true and correct as of the record date for the meeting and as of the date that is 10 business days prior to the meeting or any adjournment or postponement thereof, and such update and supplement shall be delivered to, or mailed and received by, the Secretary at the principal executive offices of the Corporation not later than five business days after the record date for the meeting (in the case of the update and supplement required to be made as of the record date), and not later than five business days prior to the date for the meeting, if practicable (or, if not practicable, on the first practicable date prior to) any adjournment or postponement thereof (in the case of the update and supplement required to be made as of 10 business days prior to the meeting or any adjournment or postponement thereof).8

8 Most first-generation advance notice bylaw provisions did not include an updating requirement. This provision provides for two specific points in time where the stockholder proponent must update or supplement the information in the original notice to maximize the transparency of the nomination or other business. Further, at least one commentator has suggested incorporating a continuous beneficial ownership disclosure requirement, using an expansive definition of
(d) A person shall not be eligible for election or re-election as a director at an annual meeting unless (i) the person is nominated by a stockholder of record in accordance with Section 1(b)(iii); or (ii) the person is nominated by or at the direction of the Board of Directors or a duly authorized committee thereof. Only such business shall be conducted at an annual meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this section. The chair of the meeting shall have the power and the duty to determine whether a nomination or any business proposed to be brought before the meeting has been made in accordance with the procedures set forth in these Bylaws and, if any proposed nomination or business is not in compliance with these Bylaws, to declare that such proposed business or nomination shall not be presented for stockholder action at the meeting and shall be disregarded.

(e) For purposes of these Bylaws, “public announcement” shall mean disclosure in a press release reported by a national news service or in a document publicly filed by the Corporation with the Securities and Exchange Commission pursuant to Section 13, 14 or 15(d) of the Exchange Act.

(f) Notwithstanding the foregoing provisions of this Section 1, a stockholder shall also comply with all applicable requirements of the Exchange Act and the rules and regulations thereunder with respect to matters set forth in this Section 1. Nothing in this Section 1 shall be deemed to affect any rights of stockholders to request inclusion of [non-binding] proposals in the Corporation’s proxy statement pursuant to Rule 14a-8 under the Exchange Act.  

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beneficial ownership similar to Section 1(c)(iii)(b), once a stockholder crosses a particular threshold, such as 5% or 10%. This continuous disclosure requirement would be intended to supplement the SEC beneficial ownership reporting regime and address its deficiencies. As a suggested remedy, noncompliance would disqualify the stockholder or beneficial owner from being able to nominate directors or propose business at the next two successive annual meetings (or any special meeting during this period).

9 In the event your company receives stockholder proposals, we recommend that you review the
Section 2. Special Meetings.

(a) Special meetings of the stockholders, other than those required by statute, may only be called by the Board of Directors, the Chairman of the Board or the Chief Executive Officer of the Corporation at such time and for such purpose as the person calling such meeting shall see fit. Special meetings of the stockholders may not be called by any other person or persons. The Board of Directors and, in the absence thereof, the Chairman of the Board or the Chief Executive Officer, may postpone or reschedule any previously scheduled special meeting. A special meeting of stockholders shall be held at such place within or without the State of Delaware or solely by means of remote communication pursuant to Section 211(a)(2) of the Delaware General Corporation Law, on such date, and at such time as designated in the notice of such special meeting.

(b) Only such business shall be conducted at a special meeting of stockholders as shall have been brought before the meeting by or at the direction of the Board of Directors or, in the absence thereof, the Chairman of the Board or the Chief Executive Officer. The notice of such special meeting shall include the purpose for which the meeting is called. If a special meeting of stockholders has been called for the purpose of the election of directors, nominations of persons for election to the Board of Directors may be made at such special meeting of stockholders (a) by or at the direction of the Board of Directors or (b) by any stockholder of record who, at the time of giving of notice provided for in this paragraph, shall be entitled to vote at the meeting and nominate...
persons for election to the Board of Directors pursuant to Section 1(b)(iii), who delivers a written notice to the Secretary setting forth the information set forth in Section 1(c)(i) and 1(c)(iii) of this Article I and who provides to the Secretary of the Corporation any updates as supplements to such notice at the times and in the forms specified in Section 1(c)(iv). Nominations by stockholders of persons for election to the Board of Directors may be made at such a special meeting of stockholders only if such stockholder of record’s notice required by the preceding sentence shall be received by the Secretary by the close of business at the principal executive offices of the Corporation not earlier than the close of business on the 120th day prior to the date of such special meeting and not later than the close of business on the later of the 90th day prior to such special meeting or, if the first public announcement of the date of such special meeting is less than 100 days prior to the date of such special meeting, the 10th day following the day on which public announcement is first made of the date of the special meeting and of the nominees proposed by the Board of Directors to be elected at such meeting. In no event shall an adjournment, or postponement of a special meeting for which notice has been given, commence a new time period (or extend any time period) for the giving of a stockholder of record’s notice. A person shall not be eligible for election or reelection as a director at a special meeting unless the person is nominated (i) by or at the direction of the Board of Directors or (ii) by a stockholder of record entitled to nominate persons for election or re-election in accordance with the procedures set forth in Section 1(b)(iii).

(c) Notwithstanding the foregoing provisions of this Section 2, a stockholder shall also comply with all applicable requirements of the Exchange Act and the rules and regulations thereunder with respect to matters set forth in this Section 2. Nothing in this

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11 See prior discussion regarding determination of the deadlines for stockholder proposals for business at the special meeting.
Section 2 shall be deemed to affect any rights of stockholders to request inclusion of proposals in the Corporation’s proxy statement pursuant to Rule 14a-8 under the Exchange Act.12

Section 3. Notice of Meetings.

(a) Notice of the place, if any, date, and time of all meetings of the stockholders, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such meeting, shall be given, not less than 10 nor more than 60 days before the date on which the meeting is to be held, to each stockholder entitled to vote at such meeting, except as otherwise provided herein or required by law (meaning, here and hereinafter, as required from time to time by the Delaware General Corporation Law or the Certificate of Incorporation of the Corporation).13

(b) When a meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxyholders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken; provided, however, that if the date of any adjourned meeting is more than 30 days after the date for which the meeting was originally noticed, or if a new record date is fixed for the adjourned meeting, notice of the place, if any, date, and time of

12 Following the Dodd-Frank Wall Street and Consumer Protection Act of 2010 (“Dodd-Frank Act”), the SEC amended Rule 14a-8(i)(8) by narrowing the so-called “election exclusion.” Under the amendments, stockholders may now submit proposals that seek to establish a procedure in a company’s governing documents for the inclusion of one or more stockholder director nominees in a company’s proxy materials. The proposals may be in the form of a bylaw amendment (if permitted by state law, the bylaw amendment may be binding) or a request to amend the company’s governing documents for this purpose.

13 Section 213 of the Delaware General Corporation Law permits a board of directors to have separate record dates for determining stockholders entitled to notice and stockholders entitled to vote at any meeting. These annotated Bylaws do not provide for bifurcated record dates.
the adjourned meeting and the means of remote communications, if any, by which stockholders and proxyholders may be deemed to be present in person and vote at such adjourned meeting, shall be given in conformity herewith. If after the adjournment a new record date for stockholders entitled to vote is fixed for the adjourned meeting, the Board of Directors shall fix a new record date for notice of such adjourned meeting, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors and, except as otherwise required by law, shall not be more than 60 nor less than 10 days before the date of such adjourned meeting, and shall give notice of the adjourned meeting to each stockholder of record entitled to vote at such adjourned meeting as of the record date fixed for notice of such adjourned meeting. At any adjourned meeting, any business may be transacted which might have been transacted at the original meeting.

Section 4. Quorum.

At any meeting of the stockholders, the holders of a majority of the voting power of all of the shares of the stock entitled to vote at the meeting, present in person or by proxy, shall constitute a quorum for all purposes, unless or except to the extent that the presence of a larger number may be required by law or by the rules of any stock exchange upon which the Corporation’s securities are listed. Where a separate vote by a class or classes or series is required, a majority of the voting power of the shares of such class or classes or series present in person

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14 The default quorum in Section 216 of the Delaware General Corporation Law is one-third. The standard practice in the US is to raise this to a majority. The NYSE, in listing rule 310.00, states that it will give careful consideration to quorum provisions with less than a majority but, in general, has not objected to reasonably lesser quorum requirements in cases where the company agrees to make general proxy solicitations for future stockholder meetings. NASDAQ listing rule 5620(c) provides that a quorum may not be less than 33 1/3% of shares outstanding. In light of the limited number of matters for which brokers have discretionary authority to vote, such as ratification of auditors, consideration may be given to adopting the European practice of lower quorum requirements, although this may increase exposure in proxy contests.
or represented by proxy shall constitute a quorum entitled to take action with respect to that vote on that matter.\textsuperscript{15}

If a quorum shall fail to attend any meeting, the chair of the meeting may adjourn the meeting to another place, if any, date, or time.

**Section 5. Presiding Officers of the Meeting.**

The Chairman of the Board or, in his or her absence, the Chief Executive Officer of the Corporation or, in his or her absence, such person as may be chosen by the Board of Directors, or if there are not remaining directors serving, such person as may be chosen by the holders of a majority of the voting power of the shares entitled to vote who are present, in person or by proxy, at such meeting shall call to order any meeting of the stockholders and act as chair of the meeting. In the absence of the Secretary of the Corporation, the secretary of the meeting shall be such person as the chair of the meeting appoints.

**Section 6. Conduct of Business.**

The chair of any meeting of stockholders shall determine the order of business and the procedure at the meeting, including such regulation of the matters to be voted upon by the stockholders, the manner of voting and the conduct of discussion as seem to him or her in order. The chair shall have the power to adjourn the meeting to another place, if any, date and time. The date and time of the opening and closing of the polls for each matter upon which the stockholders will vote at the meeting shall be announced at the meeting. No ballots, proxies or votes, nor any revocations thereof or changes thereto, shall be accepted by the inspectors or the chair of the meeting after the closing of the polls unless the Delaware Court of Chancery upon application by a stockholder shall determine otherwise.

\textsuperscript{15} Include if the corporation has multiple classes of stock.
Section 7. Proxies and Voting.

(a) At any meeting of the stockholders, every stockholder entitled to vote may vote in person or by proxy authorized by an instrument in writing or by an electronic transmission permitted by law and filed in accordance with the procedure established for the meeting. Any copy, facsimile telecommunication or other reliable reproduction of the writing or electronic transmission authorized pursuant to this paragraph may be substituted or used in lieu of the original writing or transmission for any and all purposes for which the original writing or transmission could be used, provided that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original writing or transmission.

(b) The Corporation may, and to the extent required by law, shall, in advance of any meeting of stockholders, appoint one or more inspectors to act at the meeting and make a written report thereof. The Corporation may designate one or more alternate inspectors to replace any inspector who fails to act. If no inspector or alternate is able to act at a meeting of stockholders, the person presiding at the meeting may, and to the extent required by law, shall, appoint one or more inspectors to act at the meeting. Each inspector, before entering upon the discharge of his or her duties, shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of his or her ability. Every vote taken by ballots shall be counted by a duly appointed inspector or inspectors.

(c) When a quorum is present at any meeting, action on a matter shall be approved as follows: (i) For a proposal other than the election of directors, unless these Bylaws, the Certificate of Incorporation or a specific statutory provision or stock exchange listing standard requires a different vote with respect to such proposal, or the matter has been brought before the meeting by or at the direction of the Board of Directors and the Board by resolution requires a higher vote with respect to such matter, the proposal shall be
approved if the votes cast in favor of the matter exceed the votes cast opposing the matter. (ii) In a contested director election in which the number of nominees exceeds the number of directors to be elected, each director shall be elected by the vote of a plurality of the shares represented at the meeting and entitled to vote. (iii) In an uncontested director election, each nominee who receives a majority of the votes cast shall be deemed to be elected and if an incumbent director of the Corporation receives less than a majority of the votes cast, such director shall tender his or her resignation to the Board of Directors, whereupon the Board of Directors shall within [90] days after the receipt thereof either (a) accept the resignation of such director, determine a date on which such resignation will take effect within [90] days of the date of such decision and make the effective date of such resignation public by means of a current report on Form 8-K filed with the US Securities and Exchange Commission within four business days thereof, or (b) upon the unanimous vote of the Board of Directors, decline to accept such resignation and, not later than [four] business days thereof, make public, together with a discussion of the analysis used in reaching the conclusion, the specific reasons that the Board of Directors chose not to accept the resignation and the decision was in the best interest of the Corporation and its stockholders.\(^{16}\) The provisions of this Section 7(c) will govern with respect to all votes of stockholders except as otherwise provided for in these Bylaws or in the Certificate of Incorporation or by some specific statutory provision, regulation or rule superseding the provisions contained in these Bylaws or the Certificate of Incorporation.

\(^{16}\) If the corporation does not wish to implement majority voting for directors as a Bylaw matter, then consider deleting clause (iii) and changing clause (ii) to read “In a director election, each director shall be elected by the vote of a plurality of the shares represented at the meeting and entitled to vote.”
Section 8. Stock List.

A complete list of stockholders entitled to vote at any meeting of stockholders, arranged in alphabetical order for each class of stock and showing the address of each such stockholder and the number of shares registered in his or her name, shall be open to the examination of any such stockholder for a period of at least 10 days prior to the meeting in the manner provided by law. The stock list shall also be open to the examination of any stockholder during the whole time of the meeting as provided by law. This list shall presumptively determine the identity of the stockholders entitled to examine such stock list and to vote at the meeting and the number of shares held by each of them.
Section 9. [Stockholder Nominations of Directors to be Included in the Corporation’s Proxy Materials.]

(a) Whenever the Board of Directors solicits proxies with respect to the election of directors at an annual meeting of the stockholders, subject to the provisions of this Section 9, the Corporation shall include in its proxy statement for such annual meeting, in addition to any persons nominated for election by the Board of Directors or any committee thereof, the name, together with the Required Information (as defined below), of any person or persons, as applicable, properly nominated for election (each, a “Stockholder Nominee”) to the Board of Directors by any single stockholder that satisfies, or by a group of stockholders, that together satisfy, the ownership requirements of Paragraphs (d) and (e) of this Section 9.17

17 See footnote 1 above. As discussed in the “Key Points About This Form of Public Company Bylaws,” over the past several proxy seasons, stockholder proposals have been submitted in increasing numbers requesting public companies to amend their bylaws to provide for proxy access at varying ownership threshold levels. As proxy access is expected to be a continuing area of focus in upcoming proxy seasons, we recommend that you review and continue to monitor developments in this area, including the proxy advisory firms’ and large institutional stockholders’ policies and bylaw provisions that are being advanced/adopted in this area. Because proxy access provisions could have the likely effect of encouraging activist stockholders to disrupt the long-term strategic plans of the board at the expense of short-term goals, such provisions may not be suitable for many public companies, and the advantages and disadvantages should be carefully considered before they are included in a public company’s bylaws. Boards should be educated in advance about proxy access and potential actions that can be taken so that if a proxy access stockholder proposal is received, proactive action can be taken quickly. Boards should also consider the merits of developing a proxy access bylaw to put “on the shelf.” Advance preparation in this area can be valuable with respect to information flow and action plans as well as providing the ability to quickly adopt a proxy access bylaw that has already been carefully considered, and if timely, seeking SEC no-action relief to exclude a stockholder proposal on the grounds of substantial implementation under Exchange Act Rule 14a-8(i)(10). This form of proxy access bylaw should be carefully reviewed and considered with the Baker & McKenzie attorney with whom you work in light of all these factors so that the right form of bylaw is adopted when necessary given your company’s specific facts and circumstances. Companies adopting proxy access bylaw provisions should also take note of and remember the Form 8-K, Item 5.08 reporting requirement to disclose the date by which a nominating stockholder or nominating stockholder group must submit the notice on Schedule 14N required pursuant to Exchange Act Rule 14a-18 if the company did not hold an annual meeting last year or changed the date of this year’s annual meeting by more than 30 calendar days from the date of last year’s meeting.
Section 9 (such person or group, the “Eligible Stockholder”), and who expressly elects at the time of providing the notice (the “Proxy Access Nomination Notice”) required by this Section 9 to have its nominee or nominees, as applicable, included in the Corporation’s proxy materials. For purposes of this Section 9, the “Required Information” that the Corporation will include in its proxy statement is the information provided to the Secretary of the Corporation concerning each Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Corporation’s proxy statement by Section 14 of the Exchange Act, and, if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee’s candidacy (the “Statement”). Notwithstanding anything to the contrary contained in this Section 9, the Corporation may omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes would violate any applicable law or regulation.

(b) To be timely for purposes of this Section 9, the Proxy Access Nomination Notice and Required Information must be addressed to the Secretary of the Corporation and delivered to or mailed to and received by the Secretary by the close of business at the principal executive offices of the Corporation not less than 120 or more than 150 days prior to the one-year anniversary date of the preceding year’s annual meeting of stockholders; provided, however, that, subject to the last sentence of this Section 9(b), if the meeting is convened more than 30 days prior to or delayed by more than 60 days after the anniversary of the preceding year’s annual meeting, or if no annual meeting was held in the preceding year, the Proxy Access Nomination Notice and Required Information to be timely must be so received not earlier than the

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18 Extending the general advance notice deadline of 90/120 days to the proxy access deadline/window could result in a determination by ISS that a unilateral bylaw amendment was made resulting in a negative board vote recommendation (see discussion of increasing advance notice requirements in ISS’ 2016 annual policy survey). Pre-IPO companies should consider setting both advance notice and proxy access deadlines/windows at 120/150 days.
close of business on the 150th day prior to the date of the annual meeting and not later than the close of business on the later of (i) the 120th day before such annual meeting or (ii) if the first public announcement of the date of such annual meeting is less than 130 days prior to the date of such annual meeting, the 10th day following the day on which public announcement of the date of such meeting is first made (with the last day of eligible delivery under this section being referred to herein as the “Final Proxy Access Nomination Date”). In no event shall the public announcement of an adjournment or postponement of an annual meeting of stockholders for which notice has been given, commence a new time period (or extend any time period) for the giving of a Proxy Access Nomination Notice as described above.

(c) The maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in the Corporation’s proxy materials with respect to an annual meeting of stockholders shall not exceed [20] [25]%\(^{19}\) of the number of directors in office.

\(^{19}\) Companies should consider setting a maximum number of proxy access eligible nominees. Some of the stockholder proposals submitted have provided for a 25% maximum; however, the majority of the bylaw provisions adopted since August 1, 2015 have set a 20% maximum. The Council of Institutional Investors (“CII”) opposes a limitation that would prevent stockholders from nominating at least two candidates. A majority of the bylaw provisions adopted since August 1, 2015 also provide that incumbent directors who were proxy access stockholder nominees and who are being renominated by the board will continue to count against the maximum number of permitted proxy access nominees for 2 or 3 years after their election. Generally, most recent stockholder proposals have proposed a 3% ownership threshold (which was the threshold in the SEC’s universal proxy access rules which were struck down). However, a very limited number of companies have adopted a 5% ownership threshold. Stockholder proposals and almost all adopted proxy access bylaws thus far have a continuous three-year holding period requirement (which was also the holding requirement in the SEC’s proxy access rules). Most bylaw provisions also address the use of stockholder groups. The majority of the most recent bylaw provisions adopted set the limit at 20 stockholders. The CII does not endorse a limit on the number of stockholders in the nominating group. Excluding candidates in subsequent years who received less than a specified threshold of support in the first year of nomination seems to be a universal provision being adopted by most; however, ISS has asked in its annual policy survey if this should be considered “nonresponsive,” and the CII opposes restrictions on renominations as a result of receiving a prior low vote. ISS Voting Guidelines currently provide to generally vote “for” management and stockholder proposals for proxy access with a maximum ownership threshold of not more than 3%, a maximum ownership requirement of not longer than 3 years, minimal or no limits on the number of stockholders.
as of the Final Proxy Access Nomination Date, rounded down to the closest whole number (if [20] [25]% is not a whole number) [but in any event, no fewer than two directors]¹⁹ (the “Maximum Number”). In the event that one or more vacancies for any reason occurs on the Board of Directors after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board of Directors resolves to reduce the size of the Board of Directors in connection therewith, the Maximum Number of Stockholder Nominees included in the Corporation’s proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the Corporation’s proxy materials pursuant to this Section 9 whom the Board of Directors decides to nominate as a nominee for director at the upcoming annual meeting of stockholders shall be counted as one of the Stockholder Nominees for purposes of determining when the Maximum Number of Stockholder Nominees provided for in this Section 9 has been reached. [Also, any incumbent director who had been a Stockholder Nominee with respect to any of the preceding [three (3)] [two(2)] annual meetings of stockholders and whose reelection is being recommended by the Board of Directors at the upcoming annual meeting shall be counted as one of the Stockholder Nominees for purposes of determining when the Maximum Number of Stockholder Nominees provided for in this Section 9 has been reached.]¹⁹ Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in
the Corporation’s proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the Corporation’s proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders exceeds the Maximum Number of nominees provided for in this Section 9. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the Maximum Number of nominees provided for in this Section 9, the highest ranking Stockholder Nominee who meets the requirements of this Section 9 from each Eligible Stockholder will be selected for inclusion in the Corporation’s proxy materials until the Maximum Number is reached, going in order of the amount (largest to smallest) of shares of common stock of the Corporation each Eligible Stockholder disclosed as owned in its respective Proxy Access Nomination Notice submitted to the Corporation. If the Maximum Number is not reached after the highest ranking Stockholder Nominee who meets the requirements of this Section 9 from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the Maximum Number is reached. [Notwithstanding anything to the contrary contained in this Section 9, if the Corporation receives notice pursuant to Section 1 of Article I of these Bylaws that a stockholder intends to nominate more persons for election to the Board of Directors at such annual meeting than is permitted by this Section 9(c), no Stockholder Nominees of such stockholder will be included in the Corporation’s proxy materials with respect to such meeting pursuant to this Section 9.]

(d) For purposes of this Section 9, an Eligible Stockholder shall be deemed to “own” only those outstanding shares of common stock of the Corporation as to which the stockholder possesses both (i) the full voting and investment rights pertaining to the shares and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided, that the number of shares calculated in accordance with clauses (i) and (ii)
shall not include any shares (a) sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, (b) borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell or (c) subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of outstanding common stock of the Corporation, in any such case which instrument or agreement has, or is intended to have, the purpose or effect of (1) reducing in any manner, to any extent or at any time in the future, such stockholder’s or its affiliates’ full right to vote or direct the voting of any such shares, and/or (2) hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or affiliate. For purposes of this Section 9, a stockholder shall “own” shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder’s ownership of shares shall be deemed to continue during any period in which (i) the stockholder has loaned such shares, provided that the stockholder has the power to recall such loaned shares on no more than three (3) business days’ notice or (ii) the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. The terms “owned,” “owning” and other variations of the word “own” shall have correlative meanings. Whether outstanding shares of the common stock of the Corporation are “owned” for these purposes shall be determined by the Board of Directors or any committee thereof. For purposes of this Section 9, the term “affiliate” shall have the meaning ascribed thereto under Rule 12b-2 under the Exchange Act.
(e) In order to be an Eligible Stockholder and make a nomination pursuant to this Section 9, a stockholder or group of stockholders must have owned the Required Ownership Percentage (as defined below) of the Corporation’s outstanding common stock (the “Required Shares”) continuously for the Minimum Holding Period (as defined below) as of both the date the Proxy Access Nomination Notice is delivered to or mailed to and received by the Secretary in accordance with this Section 9 and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date. For purposes of this Section 9, the “Required Ownership Percentage” is [3] [5]%\(^1\) or more, and the “Minimum Holding Period” is [three (3)]\(^1\) years. For purposes of satisfying the Required Ownership Percentage, (i) the Required Shares owned by one or more Eligible Stockholders may be aggregated, provided that the number of Eligible Stockholders whose ownership of shares is aggregated for such purpose shall not exceed [twenty (20)],\(^1\) and (ii) a group of funds under common management and investment control shall be treated as one Eligible Stockholder for this purpose.

(f) Within the time period specified in this Section 9 for delivering the Proxy Access Nomination Notice, in order for a Proxy Access Nomination Notice to be effective, the Eligible Stockholder submitting the Proxy Access Nomination Notice must provide the following information in writing to the Secretary: (i) one or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Proxy Access Nomination Notice is delivered to or mailed to and received by the Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder’s agreement to provide, within five business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder’s continuous
ownership of the Required Shares through the record date; (ii) a copy of the Schedule 14N that has been filed with the Securities and Exchange Commission as required by Rule 14a-18 under the Exchange Act; (iii) the information, representations, questionnaires and agreements that are the same as those that would be required to be set forth in a stockholder’s notice of nomination pursuant to Section 1(c) of Article I of these Bylaws; (iv) the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; (v) a representation and covenant that the Eligible Stockholder (a) acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control at the Corporation, and does not presently have such intent, (b) presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting, (c) has not engaged and will not engage in, and has not and will not be a “participant” in another person’s “solicitation” within the meaning of Rule 14a-1(1) under the Exchange Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board of Directors, (d) will comply with all applicable laws and regulations applicable to the use, if any, of soliciting material, (e) will not distribute to any stockholder any form of proxy for the annual meeting other than the form distributed by the Corporation, (f) has not nominated and will not nominate for election to the Board of Directors at the annual meeting of the stockholders any person other than the Stockholder Nominee(s) being nominated pursuant to this Section 9, and (g) will provide facts, statements and other information in all communications with the Corporation and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; (vi) a representation as to the Eligible Stockholder’s intention (subject to any mandatory fund rebalancing required by such stockholder’s preexisting governing instruments or written investment policies) to maintain qualifying ownership of the
Required Shares for at least one year following the annual meeting; (vii) an undertaking that the Eligible Stockholder (a) assumes all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder’s communications with the stockholders of the Corporation or out of the information that the Eligible Stockholder provided to the Corporation, (b) will indemnify and hold harmless the Corporation and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or actual action, suit or proceeding, whether legal, administrative or investigative, against the Corporation or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to this Section 9, (c) [with respect to any shares held or controlled by the Eligible Stockholder, will not, if otherwise permitted under these Bylaws or the Corporation’s Certificate of Incorporation, cumulate votes in favor of the election of any Stockholder Nominees nominated by the Eligible Stockholder, and (d)] 20 will provide to the Corporation prior to the election of directors such additional information as reasonably requested by the Corporation with respect thereto.

(g) Within the time period specified in this Section 9 for delivering the Proxy Access Nomination Notice, each Stockholder Nominee must deliver to the Secretary the representations, agreements, questionnaires and other information required by Section 1(c) of Article I of these Bylaws.

(h) In the event that any information or communications provided by the Eligible Stockholder or any Stockholder Nominee to the Corporation or its stockholders ceases to be true and correct in all material respects or omits a material fact necessary to make the

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20 If cumulative voting is not allowed under the Corporation’s governing documents, this provision should be deleted.
statements made, in light of the circumstances under which they were made, not misleading, each Eligible Stockholder or Stockholder Nominee, as the case may be, shall promptly notify the Secretary of any such defect in such previously provided information and of the information that is required to correct any such defect.

(i) The Corporation shall not be required to include, pursuant to this Section 9, a Stockholder Nominee in its proxy materials for any meeting of the stockholders (i) for which the Secretary receives a notice that a stockholder has nominated such Stockholder Nominee for election to the Board of Directors pursuant to the advance notice requirements for stockholder nominees for election to the Board of Directors set forth in Section 1 of Article I of these Bylaws, (ii) if the Eligible Stockholder that has nominated such Stockholder Nominee has engaged in or is currently engaged in, or has been or is a “participant” in another person’s “solicitation” within the meaning of Rule 14a-1(1) under the Exchange Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board of Directors, (iii) if the Stockholder Nominee is or becomes a party to any compensatory payment or other financial agreement, arrangement or understanding with any person or entity other than the Corporation, or is receiving or will receive any such compensation or other payment from any person or entity other than the Corporation, in each case in connection with service as a director of the Corporation, (iv) who is not independent under the listing standards of each principal exchange upon which the common stock of the Corporation is listed, any applicable rules of the Securities and Exchange Commission, or any publicly disclosed standards used by the Board of Directors in determining and disclosing independence of the Corporation’s directors, in each case as determined by the Board of Directors or any committee thereof, (v) whose election as a member of the Board of Directors would cause the Corporation to be in violation of these Bylaws, the Certificate of Incorporation, the rules and listing standards of any exchange on which the common stock of
the Corporation is listed and traded, or any applicable state or federal or other law, rule or regulation, (vi) who is or has been, within the past three years, an officer or director of a competitor, as defined in Section 8 of the Clayton Antitrust Act of 1914, (vii) who is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past 10 years, (viii) who is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, (ix) if such Stockholder Nominee or the applicable Eligible Stockholder shall have provided information to the Corporation in respect to such nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading, as determined by the Board of Directors or any committee thereof, or (x) the Eligible Stockholder or applicable Stockholder Nominee fails to comply with its obligations pursuant to this Section 9.

(j) Notwithstanding anything to the contrary set forth herein, the Board of Directors or the presiding officer of the annual meeting of stockholders shall declare a nomination by an Eligible Stockholder to be invalid, and (i) such nomination shall be disregarded and no vote on such Stockholder Nominee shall occur, notwithstanding that proxies in respect of such vote may have been received by the Corporation, (ii) the Corporation shall not be required to include in its proxy statement or on any ballot or form of proxy the disregarded Stockholder Nominee or any successor or replacement nominee proposed by the Eligible Stockholder or by any other Eligible Stockholder, and (iii) the Corporation may otherwise communicate to its stockholders, including by amending or supplementing its proxy statement or ballot or form of proxy, that the Stockholder Nominee or any successor or replacement nominee shall not be included as a director nominee in the proxy statement or on any ballot or form of proxy and shall not be voted on at the annual meeting if: (i) the Stockholder Nominee(s) and/or the applicable Eligible
Stockholder shall have breached its or their obligations under this Section 9 or otherwise failed to satisfy the terms and conditions of this Section 9, as determined by the Board of Directors or such presiding officer, (ii) the Eligible Stockholder (or a qualified representative thereof) does not appear at the annual meeting of stockholders to present any nomination made pursuant to this Section 9, or (iii) the Eligible Stockholder becomes ineligible or withdraws its nomination or a Stockholder Nominee becomes unwilling to serve on the Board of Directors, whether before or after the mailing of the definitive proxy statement.

(k) Any Stockholder Nominee who is included in the Corporation’s proxy materials for a particular annual meeting of stockholders but either (i) withdraws from or becomes ineligible or unavailable for election at the annual meeting or (ii) does not receive the favorable vote of at least 25% of the votes cast in the election of directors at the annual meeting, will be ineligible to be a Stockholder Nominee for the following two annual meetings.\(^{19}\) For the avoidance of doubt, this Section 9 shall not prevent any stockholder from nominating any person for election to the Board of Directors pursuant to and in accordance with Section 1 of Article I of these Bylaws.

(l) This Section 9 shall be the exclusive method for stockholders to include nominees for election to the Board of Directors in the Corporation’s proxy materials.\]

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**Article II**  
**Board of Directors**

**Section 1.** Number, Election and Term of Directors.

[Subject to the rights of the holders of any series of preferred stock to elect directors under specified circumstances.\(^{21}\) the number of

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\(^{21}\) Include only if a class of preferred stock is issued.
directors shall be fixed from time to time exclusively by the Board of Directors. The directors, [other than those who may be elected by the holders of any series of preferred stock under specified circumstances,] shall be divided, with respect to the time for which they severally hold office, into three classes with the term of office of the first class to expire at the Corporation’s first annual meeting of stockholders, the term of office of the second class to expire at the Corporation’s second annual meeting of stockholders and the term of office of the third class to expire at the Corporation’s third annual meeting of stockholders, with each director to hold office until his or her successor shall have been duly elected and qualified. At each annual meeting of stockholders, commencing with the first annual meeting, (i) directors elected to succeed those directors whose terms then expire shall be elected for a term of office to expire at the third succeeding annual meeting of stockholders after their election, with each director to hold office until his or her successor shall have been duly elected and qualified, and (ii) if authorized by a resolution of the Board of Directors, directors may be elected to fill any vacancy on the Board of Directors, regardless of how such vacancy shall have been created.

Section 2. Newly Created Directorships and Vacancies.

[Subject to the rights of the holders of any series of preferred stock then outstanding,] newly created directorships resulting from any increase in the authorized number of directors or any vacancies in the Board of Directors resulting from death, resignation, retirement, disqualification, removal from office or other cause shall, unless

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22 Same instruction. Also consider if holders of indebtedness have the right to elect one or more directors.

23 A classified or staggered board of directors is considered one of the most effective anti-takeover strategies, but will likely negatively affect a public company’s corporate governance ratings and draw Rule 14a-8 stockholder proposals. It is less effective if stockholders have the right to remove directors without notice. Normally, this provision would also be included in the company’s charter with a supermajority vote required to amend it.

24 Include only if a class of preferred stock is issued.
otherwise required by law or by resolution of the Board of Directors, be filled only by a majority vote of the directors then in office, whether or not such directors number less than a quorum (and not by stockholders), and directors so chosen shall serve for a term expiring at the annual meeting of stockholders at which the term of office of the class to which they have been elected expires\(^25\) or until such director’s successor shall have been duly elected and qualified. No decrease in the number of authorized directors shall shorten the term of any incumbent director.

Section 3. Eligibility for Stockholder Director Nominees.

To be eligible to be a stockholder nominee for election or reelection as a director of the Corporation, a person must deliver (in accordance with the time periods prescribed for delivery of notice under Sections 1\(,\) 2 \(\text{and}\) 9\(^26\) of Article I of these Bylaws or such period as the Board of Directors may specify) to the Secretary at the principal executive offices of the Corporation a written questionnaire with respect to the background and qualification of such person and the background of any other person or entity on whose behalf the nomination is being made (which form of questionnaire shall be provided by the Secretary upon written request) and a written representation and agreement (in the form provided by the Secretary upon written request) that such person (A) is not and will not become a party to (1) any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such person, if elected as a director of the Corporation, will act or vote on any issue or question (a “Voting Commitment”) that has not been disclosed in writing to the Corporation or (2) any Voting Commitment that could limit or interfere with such person’s ability to comply, if elected as a director of the Corporation, with such person’s

\(^{25}\) Most proxy advisory services corporate governance ratings guidelines will require that newly appointed directors serve only until the next annual meeting.

\(^{26}\) Include reference to Section 9 if proxy access bylaw provision is included in Bylaws.
fiduciary duties under applicable law, (B) is not and will not become a party to any agreement, arrangement or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director [that has not been disclosed therein]27, [(C) beneficially owns, or agrees to purchase within 90 days if elected as a director of the Corporation, not less than [___] common shares of the Corporation (“Qualifying Shares”) (subject to adjustment for any stock splits or stock dividends occurring after date of such representation or agreement), will not dispose of such minimum number of shares so long as such person is a director, and has disclosed therein whether all or any portion of the Qualifying Shares were purchased with any financial assistance provided by any other person and whether any other person has any interest in the Qualifying Shares,]28 and (D) in such person’s individual capacity and on behalf of any person or entity on whose behalf the nomination is being made, would be in compliance, if elected as a director of the Corporation, and will comply with all applicable publicly disclosed

27 Recent practice of activist hedge funds engaged in proxy contests has been to offer special compensation arrangements to their dissident director nominees. While the terms of these arrangements vary, generally they provide that if elected, the dissident director will receive large payments if the activist’s desired goals are met. In order to prohibit such compensation arrangements from occurring, the Corporation may want to delete the bracketed language (versus simply requiring disclosure of any such arrangements). However, doing so without stockholder approval may garnish an unfavorable vote recommendation by ISS. In FAQs released in January 2014, ISS stated that board adoption of restrictive director qualification/compensation bylaws without stockholder approval “may be considered a material failure of governance because the ability to elect directors is a fundamental shareholder right. Bylaws that preclude shareholders from voting on otherwise qualified candidates unnecessarily infringe on this core franchise right. Consistent with ISS’ ‘Governance Failures’ policy, we may, in such circumstances, recommend a vote against or withhold from director nominees for material failures of governance, stewardship, risk oversight, or fiduciary responsibilities. However, ISS has not recommended voting against directors and boards at companies which have adopted bylaws precluding from board service those director nominees who fail to disclose third-party compensatory payments. Such provisions may provide greater transparency for shareholders, and allow for better-informed voting decisions.” The FAQs are available here: http://www.issgovernance.com/file/files/directorqualificationcompensationbylaws.pdf.

28 Include this provision if the Corporation has qualifying share requirements in its charter (even though not required by Delaware law) or if the Corporation’s corporate governance guidelines contain minimum share ownership requirements for directors.
corporate governance, conflict of interest, confidentiality and stock ownership and trading policies and guidelines of the Corporation.

Section 4. Regular Meetings.

Regular meetings of the Board of Directors shall be held without notice at such place or places, on such date or dates, and at such time or times as shall have been established by the Board of Directors. A notice of each regular meeting shall not be required.

Section 5. Special Meetings.

Special meetings of the Board of Directors may be called by the Chairman of the Board, the Chief Executive Officer, the President, [the director elected by the non-employee, independent directors to serve as Lead Independent Director in accordance with the Corporation’s Lead Independent Director Policy (if a director has been so elected and is serving in such capacity prior to the meeting),]29 or, if requested in writing by two directors, by the Secretary and shall be held at such place, on such date, and at such time as they, or he or she shall fix. Notice of the place, date, and time of each such special meeting shall be given to each director by whom it is not waived by mail or personal delivery or by telephone or by telegraphing or telexing or by facsimile or electronic transmission of the same not less than 24 hours before the meeting.30 Unless otherwise indicated in the notice thereof, any and all business may be transacted at a special meeting.

29 Include this provision only if the Corporation has adopted a Lead Independent Director Policy that gives the Lead Independent Director the authority to call special meetings of the full Board. The Baker & McKenzie form of Lead Independent Director Policy only gives the Lead Independent Director the authority to call meetings/executive sessions of the independent directors deemed necessary; therefore, this provision would not be included if using the Baker & McKenzie form.

30 Telephone notice may be difficult to evidence and make rendering legal opinions problematic but does reduce the probability of an insurgent activist falsely claiming that a meeting is invalid due to the lack of notice.
Section 6. Quorum.

At any meeting of the Board of Directors, a majority of the directors then in office present in person, by telephone or by other electronic communications shall constitute a quorum for all purposes. If a quorum shall fail to attend any meeting, a majority of those present may adjourn the meeting to another place, date, or time, without further notice or waiver thereof.

Section 7. Participation in Meetings by Conference Telephone.

Members of the Board of Directors, or of any committee thereof, may participate in a meeting of such Board of Directors or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can speak and hear each other and such participation shall constitute presence in person at such meeting.

Section 8. Conduct of Business.

At any meeting of the Board of Directors, business shall be transacted in such order and manner as the Chairman of the Board, or in his or her absence, such chair of the meeting as the members of the Board of Directors present may elect, and such other business may thereafter be transacted in such order and manner as the Board of Directors may from time to time determine by vote of the majority of directors present, and all matters shall be determined by the vote of a majority of the directors present, except as otherwise provided herein or required by law. Action may be taken by the Board of Directors without a meeting if all members thereof consent thereto in writing or by electronic transmission, and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the Board of Directors. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.
Section 9. Compensation of Directors.

Unless otherwise restricted by the Certificate of Incorporation, the Board of Directors or a duly authorized committee thereof shall have the authority to fix the compensation of the directors. The directors may be paid their expenses, if any, of attendance at each meeting of the Board of Directors and may be paid a fixed sum for attendance at each meeting of the Board of Directors or paid a stated salary or paid other compensation as director. No such payment shall preclude any director from serving the Corporation in any other capacity and receiving compensation therefor. Members of special or standing committees may be allowed compensation for attending committee meetings.

Article III
Committees

Section 1. Committees of the Board of Directors.

In addition to the standing committees described below, the Board of Directors may from time to time designate additional committees of the Board of Directors, with such lawfully delegable powers and duties as it thereby confers, to serve at the pleasure of the Board of Directors and shall, for those committees and any others provided for herein, elect the director or directors to serve as the member or members of each such committee, designating the chair of each such committee and, if it desires, other directors as alternate members who may replace any absent or disqualified member at any meeting of each such committee. In the absence or disqualification of any member of any committee and any alternate member in his or her place, the member or members of the committee present at the meeting and not disqualified from voting, whether or not he or she or they constitute a quorum, may by unanimous vote appoint another member of the Board of Directors to act at the meeting in the place of the absent or disqualified member. There are hereby designated three standing committees of the Board of Directors: Audit Committee, Compensation Committee and Nominating and Corporate Governance
Committee. The Board of Directors shall adopt a written charter for each such standing committee addressing its purpose, responsibilities, powers, authority and any other matter required by law.31

Section 2. Regular Meetings.

Regular meetings of standing committees of the Board of Directors shall be held with or without notice at such place or places, on such date or dates, and at such time or times as shall have been established by the Board of Directors or such committee.

Section 3. Special Meetings.

Special meetings of committees of the Board of Directors may be called by the chair of such committee, the Board of Directors or, if requested in writing by two members of such committee, then by the Secretary, and shall be held at such place, on such date, and at such time as they or he or she shall fix. Notice of the place, date, and time of each such special meeting shall be given to each director by whom it is not waived by mail or personal delivery or by telephone or by telegraphing or telexing or by facsimile or electronic transmission of the same not less than 24 hours before the meeting.32 Unless otherwise

31 NYSE listing rules (Sections 303A.04-.06) require that NYSE listed companies have a nominating and corporate governance committee, a compensation committee and an audit committee; however, the listing rules also provide that the responsibilities of each such committee may be allocated to other committees of their own denomination. All such committees must have a written charter. The NASDAQ Marketplace Rules (Rule 5605(c)-(c)) require that NASDAQ listed companies have an audit committee and a compensation committee, each of which must have a written charter, and that such companies must either have a nominating committee for selecting director nominees or such function must be performed by the independent directors meeting in executive session (a written charter or board resolution, as applicable, addressing the nominations process must also be adopted). Revisions should be made if different names are desired for such committees or if different functions are allocated to each such committee. Also, there is no requirement for the standing committees to be specified in the Bylaws as these actions can be taken by resolution, but this provision is included in these form Bylaws as a continual reminder. While not addressed here, consideration should be given as to whether any committee shall have the authority to delegate its powers to a subcommittee.

32 Telephone notice may be difficult to evidence and make rendering legal opinions problematic but does reduce the probability of an insurgent activist falsely claiming that a meeting is invalid due to the lack of notice.
indicated in the notice thereof, any and all business may be transacted at a special meeting.

Section 4. Quorum.

At any meeting of a committee of the Board of Directors, a majority of the members of such committee then in office present in person, by telephone or by other electronic communications shall constitute a quorum for all purposes. If a quorum shall fail to attend any meeting, a majority of those present may adjourn the meeting to another place, date, or time, without further notice or waiver thereof.

Section 5. Conduct of Business.

At any meeting of a committee of the Board of Directors, business shall be transacted in such order and manner as the chair of such committee, or in his or her absence, such chair of the meeting as the members of such committee present may elect, and such other business may thereafter be transacted in such order and manner as such committee may from time to time determine by vote of the majority of members present, and all matters shall be determined by the vote of a majority of the members present, except as otherwise provided herein or required by law. Action may be taken by a committee of the Board of Directors without a meeting if all members thereof consent thereto in writing or by electronic transmission, and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of such committee of the Board of Directors. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

Article IV
Officers

Section 1. Generally.

The officers of the Corporation shall consist of a Chief Executive Officer, a President, one or more Vice Presidents, a Secretary and a
Treasurer and may include the Chairman of the Board\(^{33}\) and such other officers as may from time to time be appointed by the Board of Directors or by a duly authorized committee thereof. Officers shall be appointed by the Board of Directors, which shall consider that subject at its first meeting after every annual meeting of stockholders. Each officer shall hold office until his or her successor is appointed and qualified or until his or her earlier resignation or removal. Any number of offices may be held by the same person. The salaries of officers appointed by the Board of Directors or by a duly authorized committee thereof shall be fixed from time to time by the Board of Directors or by such officers as may be designated by resolution of the Board of Directors.

Section 2. Chief Executive Officer.

Subject to the provisions of these Bylaws and to the direction of the Board of Directors, the Chief Executive Officer shall have the responsibility for the general management and control of the business and affairs of the Corporation and shall perform all duties and have all powers which are commonly incident to the office of chief executive or which are delegated to him or her by the Board of Directors. He or she shall have power to sign all stock certificates, contracts, bonds, mortgages and other instruments of the Corporation and shall have general supervision and direction of all of the other officers, employees and agents of the Corporation, subject in all cases to the orders and resolutions of the Board of Directors.

\(^{33}\) In many companies, the Chairman of the Board is an officer position. If the company intends to split the role of Chairman and Chief Executive Officer and have an independent Chairman, then the Chairman should not be an officer position. If the positions are combined or if the company wants an “Executive Chairman,” appropriate modifications should be made. In December 2009, the SEC passed rules requiring Exchange Act reporting companies to provide enhanced disclosure about their leadership structure in annual meeting proxy statement or Form 10-Ks. In particular, companies must disclose whether the roles of CEO and Chairman are combined or separate and why the company believes this structure is appropriate. If a company combines these roles, it must provide additional disclosure if it has appointed a lead independent director to chair meetings of independent directors. The Dodd-Frank Act contains a similar mandate. We recommend that you periodically monitor developments in this area together with the Baker & McKenzie attorney with whom you work.
Section 3. President.

The President shall be the chief operating and administrative officer of the Corporation. He or she shall have general responsibility for the management and control of the operations and administration of the Corporation and shall perform all duties and have all powers which are commonly incident to the office of president or which are delegated to him or her by the Board of Directors. Subject to the direction of the Board of Directors and the Chief Executive Officer, the President shall have power to sign all stock certificates, contracts, bonds, mortgages and other instruments of the Corporation and shall have general supervision and direction of all of the other officers (other than the Chief Executive Officer), employees and agents of the Corporation, subject in all cases to the orders and resolutions of the Board of Directors and to the direction of the Chief Executive Officer.

Section 4. Vice President.

Each Vice President shall have such powers and duties as may be delegated to him or her by the Board of Directors. One Vice President shall be designated by the Board of Directors to perform the duties and exercise the powers of the President in the event of the President’s absence or disability.

Section 5. Treasurer.

The Treasurer shall have the responsibility for maintaining the financial records of the Corporation. He or she shall make such disbursements of the funds of the Corporation as are authorized and shall render from time to time an account of all such transactions and of the financial condition of the Corporation. The Treasurer shall also perform such other duties as the Board of Directors may from time to time prescribe.

Section 6. Secretary.

The Secretary shall issue all authorized notices for, and shall keep minutes of all meetings of the stockholders and the Board of
Directors. He or she shall have charge of the corporate books and shall perform such other duties as the Board of Directors may from time to time prescribe.

Section 7. Delegation of Authority.

The Board of Directors may from time to time delegate the powers or duties of any officer to any other officers or agents, notwithstanding any provision hereof.

Section 8. Removal.

Any officer of the Corporation may be removed at any time, with or without cause, by the Board of Directors.

Section 9. Action with Respect to Securities of Other Corporations.

Unless otherwise directed by the Board of Directors, the Chief Executive Officer, the President or any officer of the Corporation authorized by the President shall have power to vote and otherwise act on behalf of the Corporation, in person or by proxy, at any meeting of stockholders of or with respect to any action of stockholders of any other corporation in which this Corporation may hold securities and otherwise to exercise any and all rights and powers which this Corporation may possess by reason of its ownership of securities in such other corporation.

Article V
Stock

Section 1. Certificates of Stock; Uncertificated Shares.

The shares of stock at the Corporation shall be represented by certificates, provided that the Board may provide, by resolution, that some or all classes or series of its stock may be uncertificated shares. Each holder of stock represented by certificates, and upon request,
every holder of uncertificated shares, shall be entitled to a certificate signed by, or in the name of the Corporation by, the Chief Executive Officer or the President, and by the Secretary, an Assistant Secretary, the Treasurer or an Assistant Treasurer, certifying the number of shares owned by him or her. Any or all of the signatures on the certificate may be by facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate has ceased to be such officer, transfer agent or registrar before such certificate is issued, such certificate may nonetheless be issued by the Corporation with the same effect as if such person were such officer, transfer agent or registrar at the date of issue.

Section 2. Transfers of Stock.

Transfers of stock shall be made only upon the transfer books of the Corporation kept at an office of the Corporation or by transfer agents designated to transfer shares of the stock of the Corporation. Except where a certificate is issued in accordance with Section 4 of Article V of these Bylaws, an outstanding certificate for the number of shares involved, if one has been issued, shall be surrendered for cancellation before a new certificate, if any, is issued therefor.

Section 3. Record Date.

(a) In order that the Corporation may determine the stockholders entitled to notice of and/or to vote at any meeting of stockholders, or to receive payment of any dividend or other distribution or allotment of any rights or to exercise any rights in respect of any change, conversion or exchange of stock or for the purpose of any other lawful action, the Board of Directors may, except as otherwise required by law, fix a record date, which record date shall not precede the date on which the resolution fixing the record date is adopted and which record date shall not be more than 60 nor less than 10 days before the date of any meeting of stockholders, nor more than 60 days prior to the time for such other action as hereinbefore described; provided, however, that if no record date is fixed by the Board of Directors, the record date
for determining stockholders entitled to notice of and/or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held, and, for determining stockholders entitled to receive payment of any dividend or other distribution or allotment of rights or to exercise any rights of change, conversion or exchange of stock or for any other purpose, the record date shall be at the close of business on the day on which the Board of Directors adopts a resolution relating thereto.\textsuperscript{34}

(b) A determination of stockholders of record entitled to notice of and/or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

Section 4. Lost, Stolen or Destroyed Certificates.

In the event of the loss, theft or destruction of any certificate of stock, another may be issued in its place pursuant to such regulations as the Board of Directors may establish concerning proof of such loss, theft or destruction and concerning the giving of a satisfactory bond or bonds of indemnity.

Section 5. Regulations.

The issue, transfer, conversion and registration of certificates of stock shall be governed by such other regulations as the Board of Directors may establish.

\textsuperscript{34} This provision does not provide for bifurcated record dates for notice and voting at stockholder meetings as permitted under Section 213 of the Delaware General Corporation Law. If bifurcated record dates are desired, consult with the latest SEC guidance regarding proxy material delivery requirements with respect to holders on the voting record date. \textit{See} SEC Concept Release on the US Proxy System, Section VB, Release No. 34-62495.
Article VI
Notices

Section 1. Notices.
If mailed, notice to stockholders shall be deemed given when deposited in the mail, postage prepaid, directed to the stockholder at such stockholder’s address as it appears on the records of the Corporation. Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders may be given by electronic transmission in the manner provided in Section 232 of the Delaware General Corporation Law.

Section 2. Waivers.
A written waiver of any notice, signed by a stockholder or director, or waiver by electronic transmission by such person, whether given before or after the time of the event for which notice is to be given, shall be deemed equivalent to the notice required to be given to such person. Neither the business nor the purpose of any meeting need be specified in such a waiver. Attendance at any meeting shall constitute waiver of notice except attendance for the express purpose of objecting, at the beginning of the meeting, to the transaction of business because the meeting is not lawfully called or convened.

Article VII
Miscellaneous

Section 1. Facsimile Signatures.
In addition to the provisions for use of facsimile signatures elsewhere specifically authorized in these Bylaws, facsimile signatures of any officer or officers of the Corporation may be used whenever and as authorized by the Board of Directors or a committee thereof.
Section 2. Corporate Seal.

The Board of Directors may provide a suitable seal, containing the name of the Corporation, which seal shall be in the charge of the Secretary. If and when so directed by the Board of Directors or a committee thereof, duplicates of the seal may be kept and used by the Treasurer or by an Assistant Secretary or Assistant Treasurer.

Section 3. Reliance upon Books, Reports and Records.

Each director, each member of any committee designated by the Board of Directors, and each officer of the Corporation shall, in the performance of his or her duties, be fully protected in relying in good faith upon the books of account or other records of the Corporation and upon such information, opinions, reports or statements presented to the Corporation by any of its officers or employees, or committees of the Board of Directors so designated, or by any other person as to matters which such director or committee member reasonably believes are within such other person’s professional or expert competence and who has been selected with reasonable care by or on behalf of the Corporation.

Section 4. Fiscal Year.

The fiscal year of the Corporation shall be as fixed by the Board of Directors.

Section 5. Time Periods.

In applying any provision of these Bylaws which requires that an act be done or not be done a specified number of days prior to an event or that an act be done during a period of a specified number of days prior to an event, calendar days shall be used, the day of the doing of the act shall be excluded, and the day of the event shall be included.
Section 6. Dispute Resolution.

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (a) any derivative action or proceeding brought on behalf of the Corporation, (b) any action asserting a claim of breach of a fiduciary duty owed by any current or former director, officer or other employee of the Corporation to the Corporation’s stockholders, (c) any action asserting a claim arising pursuant to the Delaware General Corporation Law or the Company’s Certificate of Incorporation or Bylaws, or (d) any action asserting a claim governed by the internal affairs doctrine of the State of Delaware; provided, however, that, in the event that the Court of Chancery of the State of Delaware lacks jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another state or federal court located within the State of Delaware. Failure to enforce the foregoing provisions would cause the Corporation irreparable harm, and the Corporation shall be entitled to equitable relief, including injunctive relief and specific performance, to enforce the foregoing provisions. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Article. Further, the Court of

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35 Including this provision requires the Delaware Court of Chancery to be the exclusive jurisdiction for resolving disputes on an accelerated timeframe with more predictable certainty as to outcome and helps to avoid duplicative litigation. While a charter provision would have the added benefit of requiring a stockholder vote to remove it, including the provision in the Bylaws of already public Delaware companies can be readily achieved by board action alone. See Boilermakers Local 154 v. Chevron, C.A. No. 7220-CS (Del. Ch. June 25, 2013) at http://courts.delaware.gov/opinions/download.aspx?ID=190990 and DGCL §115. It remains to be seen whether courts in jurisdictions outside of Delaware will enforce or place limits on the enforceability of a board-adopted forum selection bylaw provision if a stockholder seeks to pursue a non-Delaware forum for litigation (e.g., (1) in 2011 in Galaviz v. Berg, 763 F. Supp 2d 1170 (N.D. Cal. 2011), the US District Court for the Northern District of California refused to enforce an exclusive forum bylaw citing, among other reasons, the absence of stockholder approval and alleged wrongdoing prior to adoption of the bylaw, but in 2014 in Groen v. Safeway Inc., No. RG14716641 (Cal. Super. Ct. Alameda County May 14, 2014), the California court declined to follow Galaviz and instead held that an exclusive forum bylaw adopted by the company was enforceable and that plaintiffs had not shown why enforcement of the provision might be unreasonable in the case and the record did not support an argument that the provision
Chancery of the State of Delaware shall have exclusive jurisdiction to determine any dispute, claim or action brought against the Corporation by any current or former director, officer or other person entitled or purported to be entitled to indemnification from the Corporation by reason of the fact that he or she (or a person for whom he or she is a representative) is or was a director or an officer of the Corporation or is or was serving at the request of the Corporation in any position or capacity for any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, whether pursuant to the Corporation’s Certificate of Incorporation, these Bylaws or contractual agreement, with respect to any claims thereunder.36

Article VIII
Indemnification of Directors and Officers

Section 1. Right to Indemnification.

Each person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a

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36 Consider adding this language so that the Delaware Court of Chancery has exclusive jurisdiction for indemnification suits brought by current or former officers and directors against the Corporation so that such disputes might be resolved on an accelerated timeframe with more predictable certainty as to outcome and litigation might be minimized.
“proceeding”), by reason of the fact that he or she (or a person for whom he or she is a representative) is or was a director or an officer of the Corporation or is or was serving at the request of the Corporation in any position or capacity for any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise (hereinafter an “indemnitee”), whether the basis of such proceeding is alleged action in an official capacity or in any other capacity shall be indemnified and held harmless by the Corporation to the fullest extent permitted by Delaware law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than such law permitted the Corporation to provide prior to such amendment), against all expense, liability and loss (including attorneys’ fees, judgments, fines, ERISA excise taxes or penalties and amounts paid in settlement) incurred or suffered by such indemnitee in connection therewith; [provided, however, that, except as provided in Section 3 of this Article VIII with respect to proceedings to enforce rights to indemnification, the Corporation shall indemnify any such indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by the Board of Directors of the Corporation.] 37

Section 2. Right to Advancement of Expenses.

In addition to the right to indemnification conferred in Section 1 of this Article VIII, the Corporation shall, to the fullest extent not prohibited by applicable law, pay the expenses (including attorney’s fees) incurred by an indemnitee in defending any such proceeding in advance of its final disposition (hereinafter an “advancement of expenses”); provided, however, that, if the Delaware General Corporation Law requires, an advancement of expenses incurred by an

37 This proviso is intended to limit indemnification where a litigious indemnitee initiates suits against the corporation or third parties, such as for defamation or declaratory judgment. If the company desires stronger indemnification rights for its directors and officers, the proviso should be modified accordingly.
indemnitee in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the Corporation of an undertaking (hereinafter an “undertaking”), by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal (hereinafter a “final adjudication”) that such indemnitee is not entitled to be indemnified for such expenses under this Section 2 or otherwise.

Section 3. Right of Indemnitee to Bring Suit.

If a claim under Section 1 or 2 of this Article VIII is not paid in full by the Corporation within 60 days after a written claim has been received by the Corporation, except in the case of a claim for an advancement of expenses, in which case the applicable period shall be 20 days, the indemnitee may at any time thereafter bring suit against the Corporation to recover the unpaid amount of the claim. Any such suit must be brought in accordance with the provisions of Section 6 of Article VII of these Bylaws. To the fullest extent permitted by law, if successful in whole or in part in any such suit, or in a suit brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit. In (i) any suit brought by the indemnitee to enforce a right to indemnification hereunder (but not in a suit brought by the indemnitee to enforce a right to an advancement of expenses) it shall be a defense that, and (ii) in any suit brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the Corporation shall be entitled to recover such expenses upon a final adjudication that, the indemnitee has not met any applicable standard for indemnification set forth in the Delaware General Corporation Law. Neither the failure of the Corporation (including its directors who are not parties to such action, a committee of such directors, independent legal counsel, or its stockholders) to have made a determination prior to the commencement of such suit that indemnification of the
The indemnity is proper in the circumstances because the indemnitee has met the applicable standard of conduct set forth in the Delaware General Corporation Law, nor an actual determination by the Corporation (including its directors who are not parties to such action, a committee of such directors, independent legal counsel, or its stockholders) that the indemnitee has not met such applicable standard of conduct, shall create a presumption that the indemnitee has not met the applicable standard of conduct or, in the case of such a suit brought by the indemnitee, be a defense to such suit. In any suit brought by the indemnitee to enforce a right to indemnification or to an advancement of expenses hereunder, or brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the burden of proving that the indemnitee is not entitled to be indemnified, or to such advancement of expenses, under this Article VIII or otherwise shall be on the Corporation.

Section 4. Non-Exclusivity of Rights.

The rights to indemnification and to the advancement of expenses conferred in this Article VIII shall not be exclusive of any other right which any person may have or hereafter acquire under any statute, the Corporation’s Certificate of Incorporation, Bylaws, agreement, vote of stockholders or directors, or otherwise.

Section 5. Insurance.

The Corporation may maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise against any expense, liability or loss, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law.
Section 6. Indemnification of Employees and Agents of the Corporation.

The Corporation may, to the extent authorized from time to time by the Board of Directors or a duly authorized committee thereof, grant rights to indemnification and to the advancement of expenses to any employee or agent of the Corporation to the fullest extent of the provisions of this Article with respect to the indemnification and advancement of expenses of directors and officers of the Corporation.

Section 7. Nature of Rights.

The rights conferred upon indemnitees in this Article VIII shall be contract rights and such rights shall continue as to an indemnitee who has ceased to be a director, officer or agent of the Corporation or who has ceased serving at the request of the Corporation in any position or capacity for any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise and shall inure to the benefit of the indemnitee’s heirs, executors and administrators. Any amendment, alteration or repeal of this Article VIII that adversely affects any right of an indemnitee or his or her successors shall be prospective only and shall not limit, eliminate or impair any such right with respect to any proceeding involving any occurrence or alleged occurrence of any action or omission to act that took place prior to such amendment or repeal.

Article IX
Amendments

In furtherance and not in limitation of the powers conferred by law, the Board of Directors is expressly authorized to adopt, amend and repeal these Bylaws subject to the power of the holders of capital stock of the Corporation to adopt, amend or repeal the Bylaws; provided, however, that, with respect to the power of holders of capital stock to adopt, amend and repeal Bylaws of the Corporation, notwithstanding any other provision of these Bylaws or any provision of law which might otherwise permit a lesser vote or no vote, but in
addition to any affirmative vote of the holders of any particular class or series of the capital stock of the Corporation required by law, these Bylaws or any preferred stock, the affirmative vote of the holders of at least 66.67% of the voting power of all of the then-outstanding shares entitled to vote generally in the election of directors, voting together as a single class, shall be required to adopt, amend or repeal any provision of these Bylaws.\(^\text{38}\)

\(^{38}\) Supermajority voting provisions for amendments are a necessary element to an effective takeover defense strategy. Nonetheless, they are controversial, are likely to lower a public company’s corporate governance rating and have been routinely repealed in stockholder Rule 14a-8 proposals (which, through precatory, usually provide a compelling reason for directors to implement them). Consideration should be given to narrowly focusing supermajority amendment requirements to specific sections, such as provisions related to advance notice, eligibility of director nominees, the ability of stockholders to propose business at special meetings and the ability of the Board to fix the number of directors and fill vacancies.
Other Key SEC Compliance Areas
Compliance with Regulation FD

Introduction

Regulation FD was adopted by the US Securities and Exchange Commission (“SEC”) in 2000 with the goal of creating a regulatory environment in which all investors have access to the same information and ending a common practice in which companies would share certain information (usually earnings guidance and forecasts) with only a select few (usually analysts and institutional investors, i.e., “Specified Persons”; see examples below under “Regulation FD – Key Requirements – C. Specified Persons under Regulation FD”).

Regulation FD – Key requirements

Regulation FD requires that when certain senior officials of public companies disclose material, nonpublic information to certain Specified Persons, the company must also disclose that information in a widely disseminated public forum.

A. Applicability. Regulation FD applies to a public company, or any person acting on its behalf.¹ Persons deemed to be “acting on

¹ The SEC’s Compliance and Disclosure Interpretations (CDIs) confirm that Regulation FD does not prohibit directors from speaking privately to shareholders or groups of shareholders. Nevertheless, the SEC emphasized the need for exercising caution as follows: “If a company’s directors are authorized to speak on behalf of the company and plan on speaking privately with a
“behalf” of the company include directors, executive officers (i.e., Section 16 filers), investor relations officials, public relations officials and other persons who regularly communicate with securities market professionals or the company’s stockholders.2

B. **Material nonpublic information.** Regulation FD prohibits the selective disclosure of material nonpublic information, such as to a shareholder, analyst, or other market professional (e.g., Specified Persons) in a private setting. Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.

Nonexclusive examples of information considered to be material include:

- Earnings information/guidance
- Likelihood of meeting analysts’ expectations for current or future periods, including certain re-affirmations of prior company guidance
- Guidance about future operating performance, restructurings or other important developments

shareholder or group of shareholders, then the company should consider implementing policies and procedures intended to help avoid Regulation FD violations, such as pre-clearing discussion topics with the shareholder or having company counsel participate in the meeting. In addition, because Regulation FD does not apply to disclosures made to a person who expressly agrees to maintain the disclosed information in confidence, a private communication between an independent director and a shareholder would not present Regulation FD issues if the shareholder provided such an express agreement.” See SEC CDIs at Question 101.11, June 4, 2010, available at [http://www.sec.gov/divisions/corpfin/guidance/regfd- interp.htm](http://www.sec.gov/divisions/corpfin/guidance/regfd- interp.htm).

2 The SEC CDIs note that if a company has a written policy that identifies certain senior officials as the only authorized spokespeople for the company, the SEC will not view the disclosure of material nonpublic information by a senior official not on that list as a violation of Regulation FD. Note, however, that disclosure of material, nonpublic information by a person not identified in the policy would be a violation of the duty of trust or confidence to the company and could potentially subject that individual to insider trading liability. See *supra* n.1 SEC CDIs at Question 101.10.
• Mergers, acquisitions, tender offers
• Dividends, stock repurchases, stock splits
• Securities offerings
• Insider buying and selling
• New products, business lines or services
• Change in strategy
• Reduction in workforce
• New or lost customers or suppliers
• Change in auditors
• Bankruptcy
• Litigation
• Management changes
• Organizational changes.

C. Specified Persons under Regulation FD. The regulation prohibits the disclosure of material, nonpublic information to certain Specified Persons, such as:

• Sell and buy side analysts
• Institutional investment managers
• Broker-dealers
• Investment advisers
Investment companies
Hedge funds
Form 13F filers
Any stockholder where it is “reasonably foreseeable” the person will trade on the information.

Excluded recipients and excepted transactions under Regulation FD

Regulation FD does not apply to communications with certain people who owe a duty of confidence to a company. Excluded recipients include attorneys, auditors, accountants, investment bankers and other people or entities that are subject to nondisclosure agreements with the company. Additionally, members of media are excluded. Communications with investment bankers and underwriters in connection with registered public offerings are also excluded.

In addition, because Regulation FD generally applies to disclosures made to any person outside the company, Regulation FD does not apply to communications of confidential information to employees of a company. However, a company’s officers, directors and employees

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3 SEC CDIs clarify that reliance on the confidentiality exclusion of Regulation FD may be accomplished through an express agreement by the recipient of the information to keep such information confidential. See supra n.1 at Questions 101.05 and 101.06.

4 See SEC Adopting Release No. 33-7881 (http://www.sec.gov/rules/final/33-7881.htm), noting that by defining the types of persons that Regulation FD applied to in Rule 100, it was exempting application “to a variety of legitimate, ordinary-course business communications or to disclosures to the media.” Even though Regulation FD doesn’t prevent a company spokesperson from communicating with a journalist, the company still needs to be concerned about disclosing material non-public information. The key inquiry for Regulation FD purposes is whether the disclosure achieves the goal of effecting broad, non-exclusionary distribution of information to the public. Companies should still proceed with caution in this area (see recent press coverage at http://www.marketwatch.com/story/apple-ceo-tim-cook-may-have-violated-sec-rules-with-jim-cramer-email-2015-08-24).

5 Note, however, that disclosure in connection with an unregistered offering, such as during road shows, is subject to Regulation FD. See supra n.1 at Questions 101.07 and 101.08.
are subject to duties of trust and confidence and are subject to insider trading liability if they tip or trade on confidential information.

**Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 – Elimination of Credit Rating Agency Exemption.** Effective October 4, 2010, the SEC amended Regulation FD to remove the exemption for disclosures made to nationally recognized statistical rating organizations and credit rating agencies for the purpose of determining or monitoring credit ratings. The elimination of the credit rating agency exemption, required under Section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, has not had a material impact on communications with rating agencies, provided that companies have utilized confidentiality provisions in rating agency engagement letters.6

**Regulation FD – affirmative steps to take when triggered**7

If material, nonpublic information regarding a company or a company’s securities is made in violation of Regulation FD, public disclosure of the information is required. The timing of the required public disclosure depends on whether the selective disclosure was intentional or non-intentional; for an intentional selective disclosure, the company must make public disclosure simultaneously; for a non-intentional disclosure, the company must make public disclosure promptly.

A. **Intentional and unintentional disclosures.** An intentional disclosure is made where the person knows or is reckless in not knowing that the disclosure includes material, nonpublic information. It is important to note that an intentional disclosure

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6 For more information, the SEC’s final rule release is available at http://www.sec.gov/rules/final/2010/33-9146.pdf.

7 Previous enforcement actions brought by the SEC emphasize the importance of promptly mitigating potential regulation FD violations when discovered. Examples include corrective disclosures (i.e., via a Form 8-K) and self-reporting the violation(s) to the SEC as appropriate. See http://www.sec.gov/litigation/litreleases/2009/lr21222.htm.
can be made even if the person does not originally intend to disclose such information. For example, during a nonpublic meeting with analysts, a company’s CEO provides material, nonpublic information on a subject she/he had not planned to cover. As set forth in the SEC CDIs, this would be considered an intentional disclosure and Regulation FD would mandate public disclosure of such information to be made simultaneously.\(^8\)

If an unintentional disclosure is made, Regulation FD requires prompt public disclosure of the information. To promptly disclose means as soon as reasonably practicable after a senior official learns there has been a non-intentional covered disclosure, but in no event after the later of 24 hours or the commencement of the next day’s trading.

### B. Means of making public disclosures.\(^9\)

Public disclosure may be made by furnishing or filing a Form 8-K with the SEC or by

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\(^8\) See supra n.1 SEC CDIs at Question 102.04.

\(^9\) Note that the NYSE and NASDAQ have harmonized their respective listing rules with Regulation FD and provide that material news developments required to be released should be disclosed by means of any Regulation FD compliant method (or combination of methods). See NYSE Listed Company Manual Section 202.05 and 202.06, as well as recent amendments thereto in NYSE Rule Change Release No. 34-75809 (available at http://www.sec.gov/rules/sro/nyse/2015/34-75809.pdf), and NASDAQ Listing Rule 5250(b). For NYSE listed companies, effective September 26, 2015, the NYSE extended the pre-market hours during which companies must give notice to the NYSE before announcing material news, so that companies will have to notify the NYSE in connection with any announcements made after 7:00 a.m. ET. The amendments also provide guidance on the release of material news after the close of trading, update the acceptable methods for releasing material news and give the NYSE additional authority to halt trading in certain situations. A memo distributed by the NYSE discussing the changes is available here. NASDAQ IM-5250-1 details the prior notification requirements for NASDAQ listed companies. On October 15, 2015, NASDAQ issued new guidance that recommends that listed issuers wanting to issue material news after the regular market close at 4:00 p.m. ET wait until at least 4:01 p.m. ET, and preferably until 4:05 p.m. ET, to disclose the news. The recommendation is intended to provide the maximum opportunity for the closing price to be fully disseminated before an issuer’s news release. The NASDAQ guidance also reminded listed companies that changes to a company’s earnings release, dividend record and dividend payment dates may be material information that should be promptly publicly disclosed through a Regulation FD compliant method with advance notification to NASDAQ’s MarketWatch Department. See NASDAQ Issuer Alert 2015-001 (Oct. 15, 2015), available at http://nasdaq.cchwallstreet.com/nasdaq/pdf/nasdaq-issalerts/2015/2015-001.pdf.
disseminating the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public. Other methods of dissemination include issuing a widely disseminated press release (via Business Wire or a similar service) or holding a publicly accessible conference call or webcast (provided that adequate advance public notice is made).\(^\text{10}\)

C. **SEC Guidance on website disclosure – is corporate website disclosure sufficient?** In August 2008, the SEC issued guidance to assist companies with determining whether and when information posted on a company website is “public” for purposes of the applicability of Regulation FD (“SEC Guidance”).\(^\text{11}\) This analysis was designed to assist companies with the evaluation of:

(i) whether and when information posted on a company website is deemed “public” so that a subsequent disclosure of that information to a Specified Person in Regulation FD is not a disclosure of nonpublic information; and (ii) in the event a selective disclosure is made, whether posting that information on a company website is an acceptable method of “public disclosure” under Regulation FD. Although the SEC did not provide bright-line tests to make these determinations, it did provide non-exclusive factors for companies to consider in this analysis.

In evaluating whether information is “public” for purposes of the SEC Guidance, companies must consider whether and when:

- a company’s website is a recognized channel of distribution;
- posting of information on a company website disseminates the information in a manner making it available to the securities marketplace in general; and

\(^{10}\) See *supra* n.1 SEC CDIs at Question 102.01.

there has been a reasonable waiting period for investors and the market to react to the posted information.

With respect to the first element noted above, the SEC Guidance provides that the determination as to whether a company’s website is a recognized channel of distribution will depend on the steps it has taken to alert the market to its website and disclosure practices, as well as the use by investors and the market of the company’s website. The question of whether website posting constitutes adequate “dissemination” under the second element of the analysis should be evaluated by examining: (i) the manner in which information is posted on a company website; and (ii) the timely and ready accessibility of such information to investors and the markets.

The SEC Guidance provides a list of non-exclusive factors to consider when evaluating the first two elements above, including:

- **Marketplace Awareness** – whether and how a company informs investors and the marketplace about its website and the availability of disclosures and periodic reports (i.e., does the company include disclosure of its website address and the fact that it routinely posts important information there in its SEC periodic reports and press releases?).

- **Posting Pattern/Practice** – Does the company have a pattern of posting important information on its website and does it make the market aware of this practice?

- **Website Design** – Is the company’s website designed to lead investors and the market efficiently to information about it? Is the information prominently disclosed in a location known and routinely used for such disclosures? Is the information presented in format readily accessible by the general public?

- **Regular Media Distribution** – Is the information posted on the website regularly picked up and distributed by the market and
“readily available media”? This may depend on the company’s market capitalization and following. Smaller companies may need more steps.

- **Accessibility** – What steps has the company taken to make the information on its website accessible (e.g., “push” technology)? Is the company’s Internet infrastructure able to accommodate traffic spikes that may accompany the posting of major information?

- **Website Maintenance** – Does the company keep its website current and accurate?

The third element in evaluating whether and when information posted on a company website is public for purposes of evaluating whether a subsequent disclosure might implicate Regulation FD requires an analysis of whether investors and the market have been afforded a reasonable waiting period to react to the information. As set forth in the SEC Guidance, this analysis depends upon facts and circumstances unique to a particular company, including:

- **Company Characteristics** – size and market following.

- **Website Access** – extent to which investor-oriented information on website is regularly accessed.

- **Market Awareness** – steps that the company has taken to make investors and the market aware that its website is used as a key source of important company information and to identify the location of posted information.

- **Active Dissemination** – whether the company has taken steps to actively disseminate the information or the availability of the information posted, including using other channels of distribution.
• *Nature and Complexity of Information* – if the information is important, whether the company has taken additional steps before posting to alert investors and the market to the fact that important information will be posted (e.g., filing a Form 8-K, issuing a press release, etc.).

The SEC Guidance notes that even though the posting of information on a company website in a form and manner readily accessible to the general public would not be “selective” disclosure, this information *may not be* “public” in determining whether a subsequent selective disclosure under Regulation FD is triggered. However, if the information posted on a company website *is not deemed* “public” under the above analysis, the subsequent selective disclosure of such “material” information may implicate Regulation FD.

In the event a selective disclosure under Rule 101(e) of Regulation FD is discovered, a company must file or furnish a Form 8-K or use alternative method(s) of disclosure reasonably designed to provide broad, non-exclusionary distribution of the information to the public. As noted above, this information must be disclosed simultaneously in the case of an intentional disclosure and promptly where an unintentional disclosure has been made. To determine whether and when postings on a company website are reasonably designed to provide broad, non-exclusionary distribution of that information to the general public under Rule 101(e), the SEC advises companies to consider whether the company is a recognized channel of distribution and whether the information is posted, accessible and therefore disseminated as discussed above. A company must also evaluate whether its website is capable of meeting the simultaneous or prompt timing requirements. The SEC Guidance does not provide a bright-line analysis here as this determination is ultimately the responsibility of the company.

It is advisable to review the SEC Guidance and to utilize a corporate website as a “one-stop-shop” for all corporate
information, including a copy of the Regulation FD compliance plan. Companies should post copies of Exchange Act filings, quarterly call scripts, presentation materials, audio archives or transcripts of quarterly calls and copies of presentation materials used in external speaking events and other relevant information about the company in an easily accessible and widely publicized manner. To this end, the SEC encourages companies to keep the information current and accurate, and point investors and the markets to the company website and the information it contains.

D. **SEC Guidance on use of social media.** At the time it issued the SEC Guidance in 2008 relating to use of websites, the SEC observed that it expected to see continued advances in communications technology. The SEC Guidance in 2008 was therefore intended to provide a factor-based framework for analysis rather than a set of static rules to accommodate new technologies. Increasing use of social media, however, presented a new area in the Regulation FD analysis that resulted in further guidance being issued by the SEC in April 2013 in a Report of Investigation issued pursuant to Section 21(a) of the Exchange Act (the “Report”).

12 In July 2012, the CEO of Netflix used his personal Facebook page to announce that Netflix had streamed one billion hours of content in the month of June. Neither the CEO nor Netflix had previously used the CEO’s personal Facebook page to announce company metrics, and Netflix had not previously told stockholders that the CEO’s Facebook page would be used to disclose information about Netflix. Following the Facebook post, Netflix’s stock jumped 20%. The SEC began an investigation in December 2012 to determine whether there was a Regulation FD violation as a result of the Facebook post. In April 2013, the SEC announced that it would not bring an enforcement action in the matter and issued its Report to provide guidance to issuers regarding how Regulation FD and the 2008 SEC Guidance apply to disclosures through social media channels. The Report made two important clarifications: (i) issuer communications made through social media channels require careful Regulation FD analysis comparable to communications made through more traditional channels, and (ii) the principles outlined in the 2008 SEC Guidance, specifically the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information, apply with equal force to corporate disclosures through social media channels. A copy of the Report is available at [http://www.sec.gov/litigation/investreport/34-69279.pdf](http://www.sec.gov/litigation/investreport/34-69279.pdf).
In the Report, the SEC stated that communications through social media should be examined for compliance with Regulation FD, and if material non-public information is disclosed via social media channels to individuals covered by Regulation FD, then such dissemination must be “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.” The SEC also stated that the 2008 SEC Guidance regarding the use of websites would provide the relevant framework for this analysis. As a result, the non-exclusive factors described above under “SEC Guidance on website disclosure - is corporate website disclosure sufficient?” should be used when evaluating whether a release of material non-public information through social media channels qualifies as a method “reasonably designed to provide broad, non-exclusionary distribution of the information to the public” within the meaning of Regulation FD.13

E. Suggested disclosure format. For most companies, it is unlikely that a website posting or dissemination through a social media channel14 alone will unequivocally be considered adequate distribution to the public under Regulation FD. Accordingly, a suggested means of disclosure or “best practice” includes a combination of the following:

- Issue a widely circulated press release;
- Advance notice of conference where public is granted access;
- Simultaneous webcast of conference; and/or

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13 Companies should note that, based on the SEC’s Report, it is unlikely that an executive’s personal social media site would qualify as “reasonably designed to provide broad, non-exclusionary distribution of information to the public.”

14 Companies should consider indicating in their Regulation FD policies whether or not they intend to use the corporate website or a particular social media channel as a Regulation FD channel.
• Post information on the corporate website and keep such information publicly available for a reasonable period of time.

Practical Considerations – Regulation FD compliance steps and best practices

A. Internal policies and practices.

• **Adopt and implement a Regulation FD Policy.** A company’s disclosure committee, or other committee performing similar functions, should review the requirements of Regulation FD and prepare a written compliance plan that provides guidelines for disclosure of corporate information and identifies persons to speak on behalf of the company. The board should review and approve the policy on an annual basis.\(^\text{15}\)

• **A company is encouraged to provide adequate Regulation FD compliance training to company personnel.**\(^\text{15}\)

• A company should consider naming or hiring an individual to serve as a dedicated Investor Relations Officer (“IRO”). The IRO becomes the in-house expert in a company’s disclosure and compliance guidelines and is the central repository for

\(^{15}\) In *SEC v. Christopher A. Black*, Case No. 09-CV-0128 (S.D. Ind., September 24, 2009), the SEC brought an enforcement action against only the senior official who had allegedly violated Regulation FD and not also against the company. The company’s implementation of appropriate policies and employee training were among the several factors the SEC indicated it had considered determinative in deciding not to bring an enforcement action against the company. *See also, SEC Release No. 34-70337, Order Instituting Cease-and-Desist Proceedings: In the matter of Lawrence D. Polizzotto* (Sept. 6, 2013), settling charges that the former head of investor relations at First Solar, Inc. violated Regulation FD. Notably, the SEC did not bring any charges against the company for several reasons including, among others, the company’s extraordinary cooperation with the SEC’s investigation, its cultivation of an environment of compliance through the use of a disclosure committee that focused on Regulation FD compliance and its undertaking of remedial measures including providing Regulation FD training to all employees.
disclosure records. In the event of selective disclosure of material, nonpublic information, the company’s IRO ensures that the information is promptly and widely disseminated in compliance with Regulation FD.

• The disclosure committee should be an integral part of material public disclosures and be the final arbiter with respect to materiality determinations.

• A company should utilize its website to bolster its Regulation FD compliance. As a best practice, consider utilizing the corporate website as a “one-stop shop” for all company information, including a copy of the Regulation FD compliance plan. In addition, the company should post on its website copies of quarterly call scripts and presentation materials, audio archives or transcripts of quarterly calls, copies of presentation materials used in external speaking events and the text of speeches and interviews given by the company senior officials at the time of each event. If a company desires to utilize social media for the dissemination of material non-public information, it should re-examine its controls and procedures to confirm that they apply to the release of company information through social media. It should also enact or update its policies on the personal use of social media channels, especially as such policies relate to the use of social media by directors and key executive officers.

• Consider referencing your company’s Regulation FD policy in other general corporate compliance policies, including the Insider Trading Policy and Code of Business Conduct. All policies should compliment one another and work together.

• In addition to the requirements of Regulation FD, company procedures should consider the advance notice rules of the NYSE and NASDAQ, as applicable:
Compliance with Regulation FD

- **NYSE**: Section 202.06 of the NYSE Listed Company Manual requires ten minutes advance notice prior to the dissemination of material news. Dissemination of the material news may be made through any Regulation FD compliant method.

- **NASDAQ**: IM-5250-1 requires that listed companies provide notice ten minutes prior to the release of certain information, including: (i) financial-related disclosures; (ii) corporate reorganizations and acquisitions; (iii) new products or discoveries, or developments regarding customers or suppliers; (iv) senior management changes or a change in control; (v) resignation or termination of independent auditors, or withdrawal of a previously issued audit report; (vi) events regarding the company’s securities; (vii) significant legal or regulatory developments; or (viii) any event requiring the filing of a Form 8-K.

### B. **Quarterly financial results and confirmations of forecasts.**

- Quarterly calls reporting financial results should be widely announced and tightly scripted. Based on existing SEC CDIs in this area, the following actions are recommended:
  - **Quiet periods.** Adoption of quiet periods commencing [two weeks] prior to the close of each fiscal quarter and continuing until financial results are publicly announced.\(^{16}\)
  - **Adequate notice.** A company should provide adequate public notice of all quarterly calls, preferably through a widely disseminated press release containing information about the call and access instructions for

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\(^{16}\) Ensure that the Quiet Period corresponds with your company’s Insider Trading Policy.
the public. Adequate advance notice includes the date, time, subject matter and call-in information for the conference call and should provide a reasonable period of time ahead of the conference call.\footnote{See supra n.1 SEC CDIs at Question 102.01.}

- **Public disclosure prior to call.** A company should consider publicly disclosing the earnings information to be covered prior to the call using a widely disseminated press release and furnishing that press release to the SEC as an exhibit to a current report on Form 8-K.

- **Script both the presentation and answers to anticipated questions.** A company should prepare a script for the call as well as answers to anticipated questions, so that proper simultaneous disclosure can be made.

- **Limit topics of discussion that were not scripted.** The IRO should be present for the call and when the answer to a question would require disclosure of material, nonpublic information outside the scope of the purpose of the call, the IRO should decline to answer the question, and (if appropriate) inform the caller that the question will be answered in a press release or other SEC filing.

  - It is always recommended to utilize specifically tailored safe harbor language.

  - SEC CDIs provide that a company may selectively confirm a forecast it has previously made to the public without triggering the public reporting requirements of Regulation FD. However, in assessing the materiality of the confirmation, the
company should consider whether the confirmation conveys any information above and beyond the original forecast and whether that additional information is itself material. This analysis may depend upon the amount of time that has elapsed between the original forecast and the confirmation. For example, if a company confirms a forecast at the quarter-end that it provided before or at the beginning of the quarter, such confirmation could be subject to Regulation FD. In the case of confirming or updating a prior forecast, we recommend that the company disclose the confirmation or update the prior forecast to alert the public in a Regulation FD-compliant manner.\(^{18}\)

- According to SEC comments, a statement by a company that it has not changed or that it is still comfortable with a prior forecast is not different than a confirmation, and, under certain circumstances, the company’s reference to a prior forecast may imply that the company is confirming the forecast. To avoid triggering Regulation FD, the company may simply state “no comment” when asked about a prior forecast or indicate that such forecast was as of the date it was given and is not being updated at the time it is referred to.\(^{19}\)

C. **Private communications with analysts, investors and other market professionals.**

- A company should limit the information given in private communications with analysts or investors. A script should be prepared in advance of the scheduled communications that includes prepared answers to anticipated questions. The company spokesperson should review and be aware of previously disclosed public information and company

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\(^{18}\) See supra n.1 SEC CDIs at Question 101.01.

\(^{19}\) Id.
statements and should keep the communication within the parameters of the previously disclosed public information.

- A company can review and comment on an analyst’s model privately without triggering Regulation FD, provided that the company does not use the opportunity as a vehicle to communicate material, nonpublic information. SEC CDIs indicate that a company ordinarily would not be conveying material nonpublic information if it corrected historical facts that were a matter of public record. A company also would not be conveying such information if it shared seemingly inconsequential data which, pieced together with public information by a skilled analyst with knowledge of the company and the industry, helps form a mosaic that reveals material, nonpublic information. The SEC also notes that it would not violate Regulation FD to reveal this type of data even if, when added to the analyst’s own fund of knowledge, it is used to construct his or her ultimate judgments about the company. However, because reviewing and commenting on an analyst’s model may be a “slippery slope” and will be reviewed by the SEC with the benefit of 20-20 hindsight, caution should be exercised, and where possible, a company should try to avoid reviewing and commenting on an analyst’s model.

- SEC CDIs state that a company may provide material nonpublic information to an analyst provided that the analyst expressly agrees to maintain the confidentiality of the information until it is made public.

- How you say it may be as important as what you say. Implicit communications and signals to analysts and investors are not beyond the reach of Regulation FD. It is important to be wary

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20 See supra n.1 SEC CDIs at Question 101.03.
21 Id. at Question 101.06.
of verbal cues when communicating with analysts and other market professionals. If the communication is brought into question, the SEC will judge the impact of non-verbal cues.

- Consider declining to answer certain questions meant to elicit material nonpublic information, but telling analysts the company will issue a press release on the subject. Red flags are often indicated by an analyst’s “hard sell” for the information.

- Be extremely cautious in one-on-one settings with market professionals and in email communications.

- Avoid commenting on or reviewing draft analyst reports. Similarly, a company should avoid distribution or sponsorship of analysts’ reports to avoid “entanglement” or “endorsement” claims.

- Provided that the communication is consistent with prior public disclosure, it is permissible to discuss with analysts information about the company’s long-term strategy for business operations, the company’s history, mission and goals, management’s philosophy and the company’s competitive advantages and disadvantages.

D. **Investor conferences.**

- Consider webcasting the presentation and the Q&A.

- Review the information from the most recent conference call to ensure that the company remains within the four corners of the previous call.

- Be mindful of information communicated or discussed during “break-out” sessions.

- Caution analysts about topics that are “off limits.”
We trust the foregoing is helpful. Please note that this memorandum includes simplified discussions of complex US federal securities laws and does not address all the aspects of such rules and regulations. Please let us know if you have any questions or would like to discuss.
[COMPANY NAME]

Regulation FD Corporate Communications Policy

Introduction

This is our disclosure policy concerning communications with securities analysts, institutional investors, money managers, investment advisers, securities brokers, or mutual funds and with our shareholders (“Specified Persons”).

Regulation FD prohibits the selective disclosure of material, nonpublic information, such as earnings warnings, to Specified Persons, before disclosing such information to the general public. This policy is intended to assist our authorized spokespersons to comply with Regulation FD and sets forth our commitment to fair disclosure of information about us without advantage to any particular analyst, investor or other Specified Person.

This policy applies to all communications by us and our directors, officers, and other employees with Specified Persons. This policy shall be distributed to all our employees.

I. Core policies

A. Authorized spokespersons. No one except the CEO, [COO], CFO and/or Vice President of Corporate Communications &
Investor Relations Officer ("authorized officers") shall communicate with Specified Persons on matters concerning [COMPANY NAME] and each of its subsidiaries and affiliates, separately or collectively, except that our Vice President of Corporate Communications & Investor Relations Officer may respond to calls from Specified Persons by referring the callers to already-public information in our SEC filings, press releases, or our website. Other officers and employees may communicate with Specified Persons only after an authorized officer has authorized such employee or officer to communicate with Specified Persons and has reviewed and authorized the scope and content of such communication for disclosure to such Specified Persons(s) subject to any other condition such authorized officer deems necessary to comply with this policy. If you receive a request from someone outside of our company for material nonpublic information, you should not respond. Instead, ask for the person’s name and number and contact an authorized officer.

B. **No selective disclosure of material nonpublic information.** Our policy is to disclose material information about us publicly and not selectively. We prohibit the intentional disclosure of material, nonpublic information to Specified Persons or shareholders unless that information is at the same time or previously disclosed to the public. If one of our representatives unintentionally discloses material nonpublic information to Specified Persons or shareholders, we will promptly (within 24 hours) make public disclosure of that information, usually through a press release. If there is an intervening weekend or holiday, the disclosure will be before the open of market on the next trading day.4

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Persons are made in breach of the duty of trust and confidence to the company and may trigger liability under existing insider trading liability. See supra n.1 SEC CDIs at Question 101.10.

4 Public disclosure of information required to be disclosed under Regulation FD can be made either by furnishing or filing with the commission a Form 8-K disclosing that information, or by disseminating the information through another method or combination of methods of disclosure “that is reasonably designed to provide broad, non-exclusionary distribution of the information to
C. **Policy on press releases and quarterly earnings releases.** We will generally announce material information via a press release, in addition to the required SEC filings we make from time to time. In the case of regular period-end announcements of financial results, known as earnings releases, our policy is:

- to issue a press release reporting the results before or after the market closes;
- to conduct [that day] a pre-announced, publicly accessible conference call or webcast at which supplemental comments may be provided to the analysts and the public;
- to allow a limited group to ask questions on the conference call, as long as all listeners can hear the questions and answers; and
- to make an audio recording of the conference call publicly available through our website for a reasonable period of time subject to our website archive policies in effect from time to time.6

D. **Corrections and updates.** If a material public statement is found to be incorrect when made, we will endeavor to correct it immediately via appropriate public disclosure.7

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5 It is a best practice to observe a “quiet period” for a certain period of time prior to the end of each quarter that will continue until the company’s earnings information for the applicable quarter is made public. During this time, the company does not comment on its earnings estimates or other prospective financial results for the period. Ensure that this corresponds with your company’s insider trading policy.

6 It is advisable/best practice to keep such information publicly available for at least one month – some companies retain for up to a year. If Regulation G is applicable, SEC comments indicate that website postings should be available for at least one year. On July 8, 2011, the SEC issued Non-GAAP CDIs available at [http://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm](http://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm). See questions 105.01-07 as they relate to financial disclosures and Regulation FD.

7 Regulation FD does not change existing law with respect to a duty to update. *See supra* n.1
announced forward-looking guidance becomes materially incorrect through passage of time or changes in circumstances, the CEO, [COO,] CFO and Vice President of Corporate Communications & Investor Relations Officer will consider whether or not to “pre-release” this information in advance of the next quarterly earnings release or conference call based on the facts and circumstances and our practices at that time. These officers will consider whether or not to make public disclosure of updated information during a quarter if known trends or uncertainties during the quarter indicate positive or negative results which differ from previously provided guidance.\[^8\]

E. Communications with analysts. We will not review or comment on analyst reports or models except that the CEO, [COO], CFO or Vice President of Corporate Communications & Investor Relations Officer may, in his or her judgment, review analyst notes or questions as to matters of historical accuracy, which can be verified by reference to already-public information, such as our SEC filings, press releases, or information posted on our website.\[^9\] Private communications with Specified Persons will not be used to confirm or correct analysts’ estimates, or otherwise provide material information, unless this material information has already been recently disclosed to the public in accordance with this policy.\[^10\]

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\[^8\] Note: The bracketed language is only appropriate if the company is going to give some kind of guidance.

\[^9\] A company may review and comment on an analyst’s model privately without triggering Regulation FD, provided that the company does not communicate material nonpublic information. For example, the company may correct historical facts that are a matter of public record. For more information, see supra n.1 SEC CDIs at Question 101.03.

\[^10\] Note, however, that a company may provide material nonpublic information to an analyst, provided that the analyst expressly agrees to maintain the confidentiality of such information. See supra n.1 SEC CDIs at Questions 101.04, 101.05 and 101.06.

In limited situations, a company may selectively confirm a forecast it has previously made without triggering the public reporting requirements under Regulation FD. This analysis requires...
F. **Regulation G requirements relating to Non-GAAP (“pro forma”) financial information.**\(^{11}\) If we make any oral or written disclosures to the public concerning “non-GAAP financial measures” (e.g., “pro forma” earnings results, EBITDA, or similar figures), we must comply with SEC Regulation G. In general, any written disclosure of non-GAAP financial measures must include a presentation of the most directly comparable GAAP figure and provide a quantitative reconciliation between the non-GAAP and GAAP numbers. This information must not misstate or omit important facts, and should give equal prominence to the GAAP and non-GAAP numbers and otherwise fairly present both sets of figures.

careful consideration of whether the confirmation conveys any information above and beyond the original forecast and whether such information is material. The materiality determination may depend on the amount of time that has elapsed between the original forecast and the confirmation, and intervening events. For example, if a company’s forecast is highly dependent on a particular customer and that customer subsequently announces that it is ceasing operations, a confirmation by the company of a prior forecast may be material. *See supra* n.1 SEC CDIs at Question 101.01.

As best practice, private communications with Specified Persons (such as analysts) should be limited and tightly scripted. The SEC has warned that “when a company official engages in a private discussion with an analyst who is seeking guidance about earnings estimates, he or she takes on a high degree of risk under Regulation FD. If the company official communicates selectively to the analyst nonpublic information that the company’s anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting, the company likely will have violated Regulation FD.” The SEC cautions that “[t]his is true whether the information about earnings is communicated expressly or through indirect ‘guidance,’ the meaning of which is apparent though implied.” The SEC acknowledges that what may be immaterial to a reasonable investor may help an analyst reach a material conclusion. Therefore, a company “is not prohibited from disclosing a non-material piece of information to an analyst, even if, unbeknownst to the company, that piece helps the analyst complete a ‘mosaic’ of information that, take together, is material.” The SEC has also made it clear that it will assess whether there has been disclosure of material non-public information in light not only of what is expressly stated but also of how it was communicated through emphasis, tone and body language. The SEC will judge the impact of non-verbal cues with 20-20 hindsight. Participants’ inferences from the meeting or conversation may play a role in this assessment. See SEC Regulation FD Final Rule Release available at [http://www.sec.gov/rules/final/33-7881.htm](http://www.sec.gov/rules/final/33-7881.htm).

\(^{11}\) See SEC Non-GAAP CDIs available *supra* at n. 6.
• If historical non-GAAP measures are included, we must also disclose why the non-GAAP information is substantively useful to investors.

• If oral non-GAAP information is made public, the full reconciliation information must be orally disclosed in an acceptable manner or previously posted on our website with adequate notice of this posting as prescribed in Regulation G.

• Our authorized officers and [IR Department] are expected to be familiar with the general requirements of Regulation G and avoid any public reference orally or in writing to any non-GAAP financial measures unless these disclosures are reviewed in advance under Regulation G by our [General Counsel].

• This is a complex regulation that is not fully summarized above. Our [Vice President of Corporate Communications & Investor Relations Officer /Investor Relations Department] and [General Counsel] will periodically review and communicate appropriate policies to help assure compliance with Regulation G.

II. Explanation of core policies

A. *What are communications?* Below are some examples of communications covered by this policy. This is not an exclusive list.

• Speeches, interviews, industry and investor conferences

• Quarterly earnings releases and related conference calls

• Providing “guidance” as to our underwriting performance, financial performance or the results of our operations

• Responding to market rumors about the trading and price of our shares, our business or our financial results or any other market rumors
• Any contacts with financial analysts covering us
• Reviewing analysts reports on us
• Analyst and investor visits
• Postings on our website [or through social media channels]

B. What is material nonpublic information? Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. Information is nonpublic if it has not been disclosed to the public as described below.

Nonexclusive examples of information to be considered material under this policy include:

• Earnings information/guidance
• Likelihood of meeting analysts’ expectations for current or future periods, including certain re-affirmations of prior company guidance
• Guidance about future operating performance, restructurings or other important developments
• Mergers, acquisitions, tender offers
• Dividends, stock repurchases, stock splits
• Securities offerings
• Insider buying and selling
• New products, business lines or services
• Change in strategy
• Reduction in workforce
• New or lost customers or suppliers
• Change in auditors
• Bankruptcy
• Litigation
• Management changes
• Organizational changes

C. Means of making public disclosures. Public disclosure may be made by:

• issuing a widely disseminated press release via Business Wire or similar service;
• a publicly accessible conference call or webcast, for which there has been adequate advance public notice;
• filing of an SEC disclosure document such as a Form 8-K\textsuperscript{12} (we expect to utilize Form 8-K only for items required to be reported on that form or for special, non-ordinary course matters);\textsuperscript{13} and

\textsuperscript{12} Note that another Exchange Act filing, such as a Form 10-Q or proxy statement, may constitute public disclosure in lieu of a Form 8-K or other method provided that such information is publicly filed on EDGAR within the time frames required by Regulation FD. In so doing, the SEC advises companies to ensure that the disclosure is brought to the attention of the readers and not buried in a voluminous filing or otherwise made in a piecemeal fashion throughout the disclosure document. See supra n.1 SEC CDIs at Question 102.02.

\textsuperscript{13} As a method of complying with Regulation FD, companies may elect to disclose under Item 7.01 of Form 8-K information that is not otherwise required to be reported under Form 8-K. Regulation FD permits companies to either provide such information in a Form 8-K or disseminate the information through another method (or combination of methods) of disclosure.
• a combination of methods, including posting the information on the company’s website [or dissemination through social media channels]. 14

D. **Public access to analyst conference calls.** When we conduct quarterly analyst conference calls, we will allow the public to listen to the call via telephone dial-in or webcast systems. We may, from time to time, hold additional open analyst conference calls if the public is similarly allowed to listen in.

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14 The SEC released guidance with respect to corporate websites and compliance with Regulation FD’s public disclosure requirement in August 2008 (SEC Guidance). The determination as to whether disclosure on a company’s website by itself is a sufficient means of “public dissemination” under Regulation FD requires a detailed analysis of facts and circumstances about the company. For example, the website must be (i) a recognized distribution channel for information about the company, its business, financial condition and operations; (ii) posting of information to satisfy the public disclosure requirement must result in wide dissemination in a manner that will make it available to the marketplace in general; and (iii) a reasonable waiting period must have elapsed for investors and the market to react to the information. There is no “bright-line test” in this regard. A best practice is to use a company website as a “one-stop-shopping” for all company information, and to clearly identify the website and the information contained therein in the company’s Exchange Act filings so that investors and the marketplace in general become aware of the availability of such materials. See SEC Guidance at [http://www.sec.gov/rules/interp/2008/34-58288.pdf](http://www.sec.gov/rules/interp/2008/34-58288.pdf). This same analysis would be used to determine whether disclosure through a particular social media channel would by itself be a sufficient means of “public dissemination.” See the SEC’s Section 21(a) report at [http://www.sec.gov/litigation/investreport/34-69279.pdf](http://www.sec.gov/litigation/investreport/34-69279.pdf).
E. **Announce conference calls via advance press release.** A reasonable time before a scheduled analyst conference call, we will issue a press release which provides the date and time of the scheduled call and the specific information needed for a member of the public to dial in or access the call over the Internet.

F. **Vice President of Corporate Communications & Investor Relations Officer to field all unscheduled calls from Specified Persons.** No member of management, other than the Vice President of Corporate Communications & Investor Relations Officer, will take impromptu or unscheduled phone calls from Specified Persons. All such calls will be referred to the Vice President of Corporate Communications & Investor Relations Officer. The Vice President of Corporate Communications & Investor Relations Officer will provide no information to such callers other than information that is already publicly available.

G. **Records and scripts of material communications.** All communications with Specified Persons, except for specified routine communications otherwise described in this policy, will be scheduled ahead of time and a record of each such communication will be maintained. This includes analyst conference calls, phone calls, meetings, investor or investment banking firm conferences, breakout sessions, and other similar communications. To the extent practicable, all such communications will be based on scripts or outlines prepared in advance for both the main presentation and anticipated ranges of questions. The appropriate “forward-looking statement” disclaimer will be given at the beginning of each such communication and, if appropriate, prior to specific portions of the communication involving guidance. A copy of the scripts will be retained for a period of at least one year by the Vice President of Corporate Communications & Investor Relations Officer.

H. **Key spokespersons to keep current on company information.** All of our spokespersons are responsible for keeping current on what has and has not been publicly disclosed by us. This means, at a
minimum, reviewing all SEC filings and press releases and participating in or later listening to a recording of all public conference calls.

I. **Consult our [general counsel or associate general counsel] on questions or concerns.** Anyone, including all of our spokespersons, should confer with our [General Counsel or Associate General Counsel] whenever in doubt about whether information is material or other questions under this policy. Decisions about materiality should, when possible, be made prior to the occasion on which the discussion is to take place to avoid the need to make materiality judgments “on the spot.”

J. **Limited exceptions apply to certain people and in special transactions.** Exceptions to this policy may apply with respect to certain people who are required by professional responsibility or by contract to keep our information confidential. These include our attorneys, our auditors and accountants, our investment bankers and people or entities that are subject to nondisclosure agreements with us. In addition, communications with investment bankers and underwriters in connection with registered public offerings and communications with parties who have entered into nondisclosure agreements in connection with acquisitions, private placements, or other special transactions are permitted under this policy. If in doubt, consult with our [General Counsel or Associate General Counsel] on a case-by-

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15 Effective October 4, 2010, the SEC amended Regulation FD to remove the specific exemption from the rule for disclosures made to nationally recognized statistical rating organizations and credit rating agencies for the purpose of determining or monitoring credit ratings. The elimination of the credit rating agency exemption was required under Section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

16 As set forth in SEC CDIs, if a company wishes to rely on the confidentiality exclusion of Regulation FD, the recipient must expressly agree to keep the information confidential. See supra n.1 SEC CDIs at Question 101.06.

17 For information with respect to Regulation FD and special transactions such as private placements and public offerings, see supra n.1 SEC CDIs at Questions 101.07 and 101.08.
case basis to determine the applicability and scope of these exceptions from this policy.
Regulation FD Roadmap

<table>
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<tr>
<th>1. <strong>Who is Speaking?</strong></th>
<th>2. <strong>Who is Receiving Information?</strong></th>
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<tr>
<td>“Senior Officials”</td>
<td>“Specified Persons”</td>
</tr>
<tr>
<td>1. Any director;</td>
<td>1. A broker or dealer, or a person</td>
</tr>
<tr>
<td>2. Any executive officer;</td>
<td>associated with a broker or dealer;</td>
</tr>
<tr>
<td>3. Any investor relations or public relations officer (or a person with similar functions); or</td>
<td>2. An investment advisor, institutional investment manager, or a person associated with either an investment advisor or institutional investment manager;</td>
</tr>
<tr>
<td>4. Any other officer, employee, or agent of the company who regularly communicates with the person receiving the information or with stockholders or bondholders.</td>
<td>3. An investment company or an affiliated person thereof; or</td>
</tr>
</tbody>
</table>

**Unless:**

The Company has enacted a written policy to narrow this group by identifying certain designated senior officials who may talk to Regulation FD enumerated persons ("Specified Persons") – *but* any such non-authorized disclosure may violate insider trading law.

**However, Regulation FD does not apply to disclosure made:**

1. to any person who owes the company a duty of trust or confidence (e.g., directors, officers and other employees of the company, attorneys, accountants, etc.);
### Regulation FD Roadmap

<table>
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<tr>
<th>2. Who is Receiving Information? (cont.)</th>
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<tr>
<td>2. to any person who expressly agrees to keep the information in confidence (e.g., confidentiality agreement, etc.); or</td>
</tr>
<tr>
<td>3. in connection with certain securities offerings registered under the US Securities Act of 1933, as amended, if the disclosure is made by the registration statement, a free writing prospectus or certain other means.</td>
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Additionally, communications to members of the media are not covered by Regulation FD.
### Regulation FD Roadmap

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<tr>
<td>“Material nonpublic information regarding the company or its securities”</td>
<td>“Public Disclosure”</td>
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</table>

The company shall make public disclosure of that information by:

1. furnishing to or filing with the SEC a Form 8-K disclosing that information; or

2. disseminating the information through another method (or combination of methods) of disclosure that is “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”
### Regulation FD Roadmap

<table>
<thead>
<tr>
<th><strong>5. When Must the Public Disclosure be Made?</strong></th>
<th><strong>6. Is Disclosure via Conference Call Sufficient?</strong></th>
</tr>
</thead>
</table>
| 1. **Simultaneously**, in the case of an “intentional” disclosure  
   “*Intentional*” means the person knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.  
   2. **Promptly**, in the case of a non-intentional disclosure  
   “*Promptly*” means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day’s trading after a senior official learns of the non-intentional disclosure of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic). | **Yes, if adequate advance notice**  
Adequate advance notice includes the date, time, subject matter and call-in information for the conference call. Non-exclusive factors to determine adequate advance notice include:  
1. **Timing**: Public notice should be provided a reasonable period of time ahead of the conference call. For example, for a quarterly earnings announcement that the company makes on a regular basis, notice of several days would be reasonable. The period of notice may be shorter when unexpected events occur and the information is critical or time-sensitive.  
2. **Availability**: If a transcript or replay of the conference call will be available after it has occurred (for instance, via the company’s website), companies should indicate in the notice how, and for how long, such record will be publicly available. |
## Regulation FD Roadmap

7. **Is Disclosure on the Company’s Website or via Social Media Sufficient?**

**Maybe**

The following conditions must be satisfied for information to be “public” or publicly “disseminated” on a company’s website or through a particular social media channel. These conditions depend on facts and circumstances. There is no “bright-line” test for evaluating compliance with these conditions, no weighting of the factors or specific number of them required to be present.

1. **Recognized Distribution Channel** - website or social media channel must be a recognized distribution channel for information about the company, its business, financial condition and operations.

2. **Marketplace Availability** - posting must result in dissemination in a manner making it available to the securities marketplace in general.

For both #1 and #2, the following is a non-exclusive list of supporting factors:

- **Marketplace Awareness** - adequately informing the marketplace of the website or particular social media channel, e.g., SEC periodic reports and press release disclosure of website address or social media channel and the fact that the company routinely posts important information there

- **Pattern/Practice** - pattern of posting important information on the website or via the particular social media channel

- **Design** - website or social media channel is designed to lead investors and market efficiently to information; prominent disclosure in location known and used for such disclosure; presented in format readily accessible by general public

- **Regular Media Distribution** - website information and information disseminated through social media is regularly picked up and distributed by market and “readily available media” (may depend on market capitalization/following; smaller companies may need more steps)
### Regulation FD Roadmap

#### 7. Is Disclosure on the Company’s Website or via Social Media Sufficient? (cont.)

- **Accessibility** - Internet infrastructure is accessible and can accommodate traffic spikes that may accompany posting major information, e.g., “push” technology

- **Maintenance** - website or social media channel is kept current and accurate

- **Other Considerations** - consider nature of information and whether website or social media channel is the principal method of dissemination

#### 3. Reasonable Waiting Period - must have occurred for the securities marketplace to react to the disseminated information. Length of waiting period depends on particular company and its facts and circumstances, which may include:

- **Company Characteristics** - size and market following

- **Access** - extent to which investor-oriented information on website or social media channel is regularly accessed

- **Market Awareness** - steps that the company has taken to make investors and the market aware that its website or social media channel is used as a key source of important company information and to identify the location of posted information

- **Active Dissemination** - whether the company has taken steps to actively disseminate the information or the availability of the information, including using other channels of distribution

- **Nature and Complexity of Information** - if the information is important, whether the company has taken additional steps before posting or disseminating to alert investors and the market to the fact that important information will be posted, e.g., filing Form 8-K, issuing a press release, etc.
## Regulation FD Roadmap

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<th><strong>9. Additional Practice Tips</strong></th>
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<tr>
<td><strong>Maybe</strong></td>
<td>Per SEC interpretive guidance:</td>
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<tr>
<td>The company may make disclosure via another SEC filing (e.g., Form 10-Q, proxy statement, etc.) instead of a Form 8-K if:</td>
<td>1. Regulation FD does not create any duty to update.</td>
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<td>1. the document is filed within the required Regulation FD timeframe;</td>
<td>2. The “confidentiality agreement” exclusion requires an express agreement to keep the information confidential.</td>
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<td>2. the disclosure is brought to the attention of the reader;</td>
<td>3. After making public disclosure via an SEC filing, the company may provide the disclosure privately to a Specified Person after confirmation of the filing on the EDGAR database.</td>
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<tr>
<td>3. the disclosure is not buried within the document; and</td>
<td></td>
</tr>
<tr>
<td>4. the disclosure is not made in piecemeal fashion throughout the document.</td>
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Insider Trading Policy and Materials

This document is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.

[Company Name]

Policy on Insider Trading

Adopted _____________, 20___

In the course of performing your duties for [Company Name] and its subsidiaries (the “Company,” “we” or “us”), you may, at times, have information about us or another publicly traded company that we do business with that is not generally available to the public. Because of your relationship with us, if you are aware of material nonpublic information about the Company or another company we do business with, federal and state securities laws prohibit you from trading in the Company’s or such other company’s securities or providing material

1 Insider trading enforcement continues to be a high priority area and focus of the US Securities and Exchange Commission (“SEC”). See footnote 5 in Appendix 1. Specifically, in September 2014, the SEC announced (http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678) charges against 28 officers, directors or major stockholders for failing to promptly report information about their holdings and transactions in company stock. Six public companies were also charged for contributing to filing failures by insiders or failing to report their insiders filing delinquencies. SEC enforcement staff used quantitative data sources and ranking algorithms to identify these insiders as repeatedly filing late. It is unusual for the SEC to bring so many actions at once; the SEC continues to send a clear signal to insiders that the reporting requirements under the federal securities laws are not just suggestions but are legal obligations to be followed. For public companies that voluntarily assist insiders in complying with these filing requirements, the SEC’s enforcement actions make it clear that failure to comply with this voluntary responsibility carries with it serious consequences.
nonpublic information to others who may trade on the basis of that information.\footnote{In addition to the potential insider trading liability faced by the employee, the federal securities laws also impose potential liability on companies and other “controlling persons” who fail to take appropriate steps to prevent illegal trading. The Company, directors, officers, and certain managerial personnel could become controlling persons also subject to liability if they knew of, or recklessly disregarded, a likely insider trading violation by an employee or other personnel under their control. Historically, the SEC has sought to impose insider trading liability on employers by exercising its powers under existing statutes. Section 20(a) of the Securities Exchange Act of 1934, as amended, authorizes the SEC to bring actions against persons who “control” securities law violators. The range of persons potentially subject to “controlling person” liability may include not only the corporate employer but also (i) employees with supervisory authority, (ii) officers and directors of the employer, (iii) controlling shareholders, and (iv) parent corporations. The “controlling person” may avoid liability under Section 20(a) by showing that he or she acted in good faith and did not directly or indirectly induce the violation. Additionally, the Insider Trading and Securities Fraud Enforcement Act of 1988 expanded the SEC’s ability to sanction “controlling persons” for insider trading violations. Section 21A of the Exchange Act enables the SEC to impose significant civil penalties; a “controlling person” may be subject to such sanctions if he or she “knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred.” Furthermore, Section 32(a) of the Exchange Act authorizes criminal prosecutions against employers as the “controlling persons” of employees who engage in insider trading violations.}

This policy seeks to explain some of your obligations to us and under the law, to prevent actual, or the appearance of, insider trading and to protect our reputation for integrity and ethical conduct. This policy applies to all directors, officers and employees of the Company, as well as their family members or other persons with whom they have a relationship who are subject to this policy and entities under their influence or control, as described below. The Company may also determine that other persons should be subject to this policy, such as contractors or consultants who have access to material nonpublic information.

Additional information about this policy may be found in Appendix 1, which contains responses to frequently asked questions. Please read this policy and its Appendices in their entirety. You will be required to certify to us that you have read and understood, and agree to comply
with, this policy by signing and returning to us the form of certification that is attached as *Appendix 2*.

Your compliance with this policy is of the highest importance for you and our Company. If you have any questions about this policy, including its application to any proposed transaction, you may obtain additional guidance from [____] or [____] (our “Compliance Officers”).³

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³ Insert the titles of responsible individuals or their names (if appropriate within the organization). Given the short timeframe for turning around requests and coordinating with persons (if different) responsible for Section 16 filings, we generally recommend appointing more than one Compliance Officer. Compliance Officers should be individuals who are, at all times, aware of material developments impacting the company.
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Persons subject to this policy

This policy applies to you, any family member and any other person who has a relationship with you (legal, personal or otherwise) that might reasonably result in that person’s transactions being attributable to you. This includes any legal entities that are influenced or controlled by you or other persons who have a relationship with you and are subject to this policy, such as corporations, partnerships or trusts. For purposes of this policy, your “family members” consist of people within your family who live with you, or are financially dependent on you, and also include other family members whose transactions in securities are directed by you or are subject to your influence or control. See Appendix 1 for more information about whose transactions may be attributable to you.¹

If you are a former, temporary or retired director, executive officer² or Designated Employee (described below and at Appendix 3), this

¹ Note that cohabitants who are not family members were omitted from the definition of “family member” for purposes of this policy. This may include roommates, girlfriends or boyfriends, domestic partners and domestic servants. Depending on a given company’s circumstances, the company may wish to expressly include all persons sharing the same household (or some or all of these additional classes of relationships) within the express scope of this policy.

² In analyzing which officers to designate as Section 16 Reporting Persons, consider the May 2013 opinion of the US District Court for the District of Columbia available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009cv1423-158, which gives examples of factors to consider when determining whether a person who does not hold one of the titles specified in Rule 16a-1(f) should nevertheless be considered an officer because he or she “performs a policy-making function for the issuer.” Additionally, in light of the rules proposed by the SEC in July 2015 to require the national securities exchanges and associations to establish listing standards that require public companies to adopt, implement and disclose a compensation clawback policy providing for recovery of excess incentive-based compensation from current and former executive officers, as mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), companies should consider that the SEC has modeled the definition of “executive officer” covered in the proposed rules on the definition of “officer” under Section 16 of the Exchange Act. Clawback policies are also to apply to both former and current “executive officers” who were such during the clawback period, which is three years. Companies may want to review and reassess the duties of their executive officers to be certain they are comfortable with those in the group likely becoming subject to the clawback rules once finalized and adopted by the SEC and stock exchanges. Officers not classified as “executive officers” may be included as Designated Employees under this policy. See footnote 10 for further discussion.
policy will continue to apply to you and other persons who have a relationship with you who are subject to this policy until the later of (1) the [insert number] full trading day\(^3\) following the public release of earnings for the fiscal quarter in which you leave our Company or (2) the [insert number] full trading day\(^4\) after any material nonpublic information known to you has become public or is no longer material. For all other former, temporary, or retired personnel and other persons who have a relationship with any such persons who are subject to this policy, this policy will continue to apply until the [insert number] full trading day\(^5\) after any material nonpublic information known to you has become public or is no longer material.

Transactions by your family members and other persons subject to this policy who have a relationship with you should be treated for the purposes of this policy and applicable securities laws as if they were for your own account. Accordingly, all references to you with regard to all trading restrictions and pre-clearance procedures in this policy also apply to your family members or other persons with whom you have a relationship who are subject to this policy. You are personally responsible for the actions of your family members or other persons with whom you have a relationship who are subject to this policy. If you or they violate this policy, then we may take disciplinary action against you, including dismissal or removal for cause.

Trading restrictions and guidelines

1. No transactions while in possession of material nonpublic information

While in the possession of information that is “material” and “nonpublic” as defined in Appendix 1, you may not buy or sell our securities or engage in any other action to take advantage of, or pass on to others, material nonpublic information. Our securities include

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\(^3\) Conform to the number of trading days inserted in Section 4 below.

\(^4\) Conform to the number of trading days inserted in Section 4 below.

\(^5\) Conform to the number of trading days inserted in Section 4 below.
the Company’s common stock, options to purchase common stock, or any other type of securities that the Company may issue, including, but not limited to, preferred stock, notes, bonds, convertible debentures and warrants, as well as derivative securities whether or not issued by the Company. As described below, you are also prohibited from buying or selling the securities of any other publicly traded company while in possession of information that is material and nonpublic. This policy applies both to securities purchases (to make a profit based on good news) and securities sales (to avoid a loss based on bad news), regardless of how or from whom the material nonpublic information was obtained.

There are no exceptions to this policy, except as specifically noted below. Transactions that may be necessary or justifiable for independent reasons (such as the need to raise money for an emergency expenditure), or small transactions, are not excepted from this policy. The securities laws do not recognize any mitigating circumstances, and, in any event, even the appearance of an improper transaction must be avoided to preserve the Company’s reputation for adhering to the highest standards of conduct. This means that you may have to forgo a proposed transaction in our or another company’s securities even if you planned to make the transaction before learning the material nonpublic information and even though you believe that waiting may cause you to suffer an economic loss or not realize anticipated profit.

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6 This may include exchange traded put or call options or swaps relating to the company’s securities.

7 This policy should also be considered in relation to a company’s code of ethics and/or code of business conduct, as a waiver or amendment of this policy could constitute a waiver or amendment of the company’s code of ethics for purposes of Item 406 of Regulation S-K. A company is required to disclose any waiver or amendment of the code of ethics by filing a Form 8-K with the SEC or, under appropriate circumstances, by posting the waiver or amendment to the company’s website.

8 While this policy prohibits hardship exceptions, some companies may desire to grant hardship exceptions in limited and extenuating circumstances. If a company desires to provide for a hardship exception, consider inserting the following:
2. Policy applies to information relating to other public companies

This policy applies to material nonpublic information relating to other publicly traded companies, including our vendors, suppliers and customers, when that information is obtained in the course of employment with the Company or the performance of services on our behalf. You should treat material nonpublic information about our business partners with the same care required with respect to information related directly to the Company.

3. Blackout periods for any or all personnel

The Compliance Officers may issue instructions from time to time advising some or all personnel that they may not buy or sell our securities for certain periods, or that our securities may not be traded without prior approval. Due to the confidential nature of the events that may trigger these sorts of blackout periods, the Compliance Officers may find it necessary to inform affected individuals of a blackout period without disclosing the reason. If you are made aware of such a blackout period, do not disclose its existence to anyone. [If you are a director or an executive officer, you may also be subject to event-specific blackouts pursuant to the SEC’s Regulation BTR (Blackout Trading Restriction). This regulation prohibits certain sales and other transfers by insiders during specified pension plan blackout periods.]

Even if no blackout period is in effect, keep in mind that

“If you have an unexpected and urgent need to sell our securities in order to generate cash outside of a window period, you may request that a Compliance Officer consider granting you a hardship exception. This type of exception will only be granted if the Compliance Officer concludes that our earnings information for the applicable quarter does not constitute material nonpublic information and there are no other reasons to prohibit trading.”

If the company chooses to include a hardship exemption, the remainder of the policy would need to be modified to conform to the additional hardship exception provision.

9 This bracketed provision will be unnecessary if the company does not have an “individual account plan” that is subject to Regulation BTR. For purposes of Section 306(a) of Regulation BTR, “individual account plan” is based upon Section 3(34) of ERISA, and encompasses a variety of pension plans including Section 401(k) plans, profit-sharing and savings plans, stock bonus plans and money purchase pension plans.
you may not trade in our securities or those of another publicly traded company if you are aware of material nonpublic information about us or any such other company, respectively.

4. Trading windows for directors, executive officers, and Designated Employees

In addition to the above, if you are a director, an executive officer, or another individual designated at Appendix 3 (“Designated Employee”), you can trade in our securities only during the period that starts after the [insert number] full trading day following the release of our annual and quarterly earnings and continuing through the [specific date] day of the final month of each fiscal quarter, and only so long as you do not have any material nonpublic information about us. Because directors, executive officers and Designated Employees are especially likely to receive regular nonpublic information regarding our operations, limiting trading to this “window period” helps ensure that trading is not based on material information that is not available to the public. Before trading in our securities during the window period, directors executive officers, and

10 If identified, Designated Employees typically include senior officers and other employees who have access to sensitive information concerning the company, such as employees who work in the accounting, finance, legal, or investor relations departments or who work closely with executive officers.

11 Most companies provide a window period that begins one to three full trading days after the release of earnings. Generally, the more widespread the analyst coverage and the more rapid and complete the dissemination of released information, the greater the justification for a shorter period before the window period begins. Adjust as appropriate.

12 A window period should end within a specified period of time before the end of the company’s fiscal quarter. It is common for companies to close the window period 15 to 30 days before the end of the quarter, but the period should be adjusted, depending on the company’s circumstances. The end of the window period is often based on when management begins assembling earnings information or when period earnings become ascertainable by management. Generally, companies with earnings that are more difficult to forecast may be able to close the window period later than companies with earnings that are easier to ascertain. This will depend on factors such as the transparency of a company’s financial results before quarter-end and year-end. Compliance Officers should consider sending a notice of the date a window period will close to directors, executive officers and Designated Employees approximately one week before the close of that window period.
Designated Employees must also comply with the pre-clearance procedures discussed below.\(^{13}\)

5. Pre-clearance procedures for directors, executive officers and Designated Employees\(^{14}\)

If you are a director, an executive officer or a Designated Employee, you may not buy, sell, or engage in any other transaction in our securities without first obtaining [oral or] email pre-clearance from a Compliance Officer to confirm that the window period is open. This pre-clearance requirement is designed as a means of enforcing the policies specified above. Specifically:

- Any proposed transaction (unless otherwise specified) should be submitted to the Compliance Officers at least [two] full trading days in advance of the proposed transaction.

- A request for pre-clearance of a hedging or similar arrangement described in “Hedging transactions” below must be submitted to the Compliance Officers at least [five] full trading days prior to the proposed execution of documents evidencing the proposed

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\(^{13}\) If the company does not require pre-clearance of trades of securities, this sentence should be conformed to the applicable procedures imposed prior to trades.

\(^{14}\) The procedures should be tailored to the particular company, considering its size, resources and objectives. Other procedures are possible. For example:

- The company may require pre-clearance only of directors and executive officers.
- The company may require directors, executive officers and Designated Employees to obtain confirmation that the trading window is open only once during that trading window, regardless of the number or timing of trades during that period, and not require those persons to seek confirmation again during that trading window unless a Compliance Officer has given notice that the trading window has closed.
- Although not the preferred approach, the company may not want to require pre-clearance of trades and instead impose only a notification or consultation requirement.
- The policy could specify that notification to the Compliance Officers is necessary following completion of any pre-cleared transaction.

As an additional requirement, as a condition to preclearance, Compliance Officers could require a requestor to certify that he or she is not in possession of any material nonpublic information.
transaction and must set forth a justification for the proposed transaction.

- A request for pre-clearance of any arrangements to hold our securities in a margin account or pledge them as collateral described in “Margin accounts and pledged securities” below must be submitted to the Compliance Officers at least [five] full trading days prior to the proposed execution of documents evidencing the proposed transaction and must set forth a justification for the proposed transaction.

- Before any trade, a Compliance Officer must confirm to you [orally or] by email that the window period is open and will remain open for the period during which the trade is expected to occur.

- Any confirmation must not have been revoked by oral or email notice from a Compliance Officer.

- [Pre-cleared trades must be completed within [insert number] full trading days of receipt of pre-clearance unless an exception is granted by a Compliance Officer. Transactions not completed within the time limit are subject to pre-clearance again.]\(^{15}\)

- [You need to receive a new [oral or] email confirmation that the window period is open before each trade, whether or not confirmation has been given for a prior trade during that window period.]\(^{16}\)

- The Compliance Officers are under no obligation to approve a transaction submitted for pre-clearance and may determine not to

\(^{15}\) A company should decide whether this provision is appropriate for it. If you include this provision in your policy, three to five full trading days would be a typical time period to effect a transaction subsequent to pre-clearance.

\(^{16}\) Delete this provision if the immediately preceding bullet point is retained in the policy. Otherwise, retain this provision.
permit the transaction. If you seek pre-clearance and permission to engage in the transaction is denied, you should refrain from initiating any transaction in the Company’s securities, and should not inform any other person of the restriction.

• You are responsible for ensuring that you do not have material nonpublic information about the Company before engaging in a transaction and that you comply with any and all other legal obligations. Therefore, when a request for pre-clearance is made, you should carefully consider whether you are aware of any material nonpublic information about the Company and should describe fully those circumstances to the Compliance Officers. If you are subject to the requirements of Section 16 of the Securities Exchange Act of 1934, as amended (“Exchange Act”), you should also consider whether you have effected any non-exempt transactions within the past six months or otherwise that must be reported on an appropriate Form 4 or Form 5. In addition, you should be prepared to comply with Rule 144 under the Securities Act of 1933, as amended, and requirements to file Form 144.

• A Compliance Officer may not trade in our securities unless another Compliance Officer18 has approved the trade(s) in accordance with this policy’s procedures.

If you are considering entering into a 10b5-1 plan, refer to see Section 8 below for more information.

A Compliance Officer’s approval of a transaction submitted for pre-clearance does not constitute legal advice, does not constitute confirmation that you do not possess material nonpublic information and does not relieve you of any of your legal obligations.

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17 It is important for the company to communicate to persons subject to pre-clearance that it is that person’s (making the trade) responsibility to make a determination whether he or she is aware of any material nonpublic information.

18 Change this reference to another Compliance Officer to the Chief Executive Officer, Chief Financial Officer or other senior executive if the company only has one Compliance Officer.
6. Prohibited and limited transactions\textsuperscript{19}

Certain types of transactions increase the Company’s exposure to legal risks and may create the appearance of improper or inappropriate conduct. You may not engage in any of the following transactions, even if you do not possess material nonpublic information:

\textsuperscript{19} Certain transactions are of heightened concern not only because of insider trading considerations but also because of the appearance created by the transaction and the potential repercussions that the transaction may have with investors, regulators and others. It may be determined that prohibitions or restrictions described in Section 6 need only apply to directors and officers, while in other situations it may be appropriate to extend the restrictions to all persons covered by the policy.

Additionally, on February 9, 2015, the SEC released proposed rules to implement the hedging policy disclosure requirements under Section 955 of the Dodd-Frank Act. As proposed, the rules will require a company to disclose whether employees (including officers) and directors are permitted to or prohibited from engaging in hedging transactions offsetting any decreases in the market value of equity securities granted by the company as compensation or held, directly or indirectly, by such employees or directors. The current proposal does not require a company to prohibit hedging transactions. However, it does require a company to disclose whether any employee or director is permitted to engage in hedging transactions. To implement the rules, the SEC is proposing new Item 407(i) of Regulation S-K, believing that the disclosure required is primarily corporate governance related. The SEC noted potential overlap with CD&A disclosure, as Item 402(b) of Regulation S-K lists as one example of potentially material disclosure about a company’s executive compensation program “any registrant policies regarding hedging the economic risk” of ownership of the company’s securities. The Dodd-Frank Act requirement is broader than the CD&A provision. Accordingly, the SEC is proposing to amend Item 402(b) to add an instruction providing that a company may satisfy any CD&A obligation to disclose material policies on hedging by named executive officers by cross-referencing the Item 407(i) disclosure to the extent that the information satisfies the CD&A disclosure requirement. The comment period on the proposed rules closed on April 20, 2015; however, no further action has been taken by the SEC as of the date of these materials. If a company elects to include its policy on hedging for all employees in its insider trading policy and to prohibit such transactions (as this form of policy does), the first bullet in this section, “Hedging transactions,” should be included. Counsel should also consider Section 16, Rule 144, and policy guidelines of proxy advisory firms, such as ISS and Glass Lewis, on hedging. ISS current proxy voting policies provide for voting “Against” directors where material failures of risk oversight have occurred, which includes hedging of company stock, and generally also voting “For” stockholder proposals seeking a policy prohibiting named executive officers from engaging in derivative or speculative transactions involving company stock, including hedging. Glass Lewis policy currently provides that companies should adopt strict policies to prohibit executives from hedging the economic risk associated with their share ownership in the company. Companies should continue to monitor these rules and policies and consult with the Baker & McKenzie attorney with whom they work for further guidance in this area.
• **Hedging transactions.** The Company prohibits you from engaging in hedging and monetization transactions. Hedging and monetization transactions can be accomplished through the use of various financial instruments, including prepaid variable forwards, equity swaps, collars and exchange funds. These transactions may permit continued ownership of the Company’s securities obtained through employee benefit plans or otherwise without the full risks and rewards of ownership. When that occurs, a person entering into this type of transaction may no longer have the same objectives as the Company’s other stockholders.

• **Short sales of stock.** “Short” sales of stock are transactions where you borrow stock, sell it and then buy stock at a later date to replace the borrowed shares. Short sales generally evidence an expectation on the part of the seller that the securities will decline in value and therefore have the potential to signal to the market that the seller lacks confidence in the Company’s prospects. In addition, short sales may reduce a seller’s incentive to seek to improve the Company’s performance. For these reasons, short sales of our securities are prohibited. In addition, Section 16(c) of the Exchange Act prohibits officers and directors from engaging in short sales. These also include hedging or monetization transactions (such as zero-cost collars and forward sale contracts) that involve the establishment of a short position.

• **Publicly traded options.** A put is an option or right to sell a specific stock at a specific price before a set date, and a call is an option or right to buy a specific stock at a specific price before a set date. Generally, call options are purchased when one believes that the price of a stock will rise, whereas put options are purchased when one believes that the price of a stock will fall. Because publicly traded options have a relatively short term, transactions in options may create the appearance that trading is

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20 For more information on short selling restrictions, see the SEC’s home page at http://www.sec.gov/answers/shortrestrict.htm.
based on material nonpublic information. Further, such transactions may indicate a preference for short-term performance at the expense of the Company’s long-term objectives. Accordingly, any transactions in put options, call options or other derivative securities are prohibited by this policy.

- **[Short-term trading.** Short-term trading of the Company’s securities can create a focus on our short-term stock market performance instead of our long-term business objectives. For these reasons, persons subject to this policy who purchase (or sell) our securities in the open market may not sell (or purchase) any of the Company’s securities of the same class during the six months following the transaction.\(^{21}\)**

Additional types of transactions are **severely limited** because they can raise similar issues:

- **Margin accounts and pledged securities.**\(^{22}\) Securities held in a margin account or pledged as collateral can be sold without your consent in certain circumstances. This means that a margin sale or foreclosure sale may occur at a time when the pledgor is aware of material nonpublic information. Consequently, any person wishing to enter into such an arrangement must first obtain pre-

\(^{21}\) The prohibition applies only to purchases in the open market and would not apply to stock option exercises or other employee benefit plan transactions. A company should decide whether this provision is appropriate for it. Section 16(b) of the Exchange Act already removes the incentive for officers or directors to engage in short-term trading in company securities. This provision would extend the short-term trading prohibition to all personnel, whether or not subject to Section 16. Consequently, many companies may view this provision as overly burdensome to monitor and enforce.

\(^{22}\) ISS current proxy voting policies provide for voting “Against” directors where material failures of risk oversight have occurred, which includes significant pledging of company stock, and generally also voting “For” stockholder proposals seeking a policy prohibiting named executive officers from engaging in derivative or speculative transactions involving company stock, including holding stock in a margin account or pledging stock. Glass Lewis policy currently provides that the facts and circumstances at each company should be examined rather than applying a one-size-fits-all policy regarding stock pledging.
clearance from a Compliance Officer, as described in Section 5 above.

- **Standing and limit orders.** The Company discourages placing standing or limit orders on the Company’s securities. Standing and limit orders are orders placed with a broker to sell or purchase stock at a specified price. Similar to the use of margin accounts, these transactions create heightened risks for insider trading violations. Because there is no control over the timing of purchases or sales that result from standing instructions to a broker, a transaction could be executed when persons subject to this policy are in possession of material nonpublic information. Unless standing and limit orders are submitted under approved Rule 10b5-1 plans, discussed in Section 8 below, if you determine that you must use a standing order or limit order, the order should be limited to short duration and should otherwise comply with the trading restrictions and procedures outlined in this policy.

- **[Stock Appreciation Rights and Deferred Shares Units.** The grant and exercise of Stock Appreciation Rights (“SARs”) and Deferred Share Units (“DSUs”) are subject to this policy. Since market values of SARs and DSUs are based on the trading value of the shares subject to SARs and DSUs, these securities cannot be exercised until [insert number] full trading days after the public disclosure of quarterly financial results, in addition to the other limitations set forth in this policy.]

If you have a managed account (where another person has been given discretion or authority to trade without your prior approval), you should advise your broker or investment adviser not to trade in our securities at any time and minimize trading in securities of companies in our industry. This restriction does not apply to investments in publicly available mutual funds.
7. Special types of permitted transactions

There are limited situations in which you may buy or sell our securities without restriction under this policy. Unless otherwise noted below, you may:

- allow for the vesting of restricted stock;

- exercise a tax withholding right with respect to restricted stock pursuant to which you elect to have the Company withhold shares of stock to satisfy tax withholding requirements upon vesting (but this does not include market sales of stock);

- exercise stock options that have been granted to you by the Company or under one of our stock option plans, including any net exercise of the option pursuant to which you have elected to have the Company withhold shares of stock to satisfy tax withholding requirements or the exercise price of the option (but this does not include broker-assisted cashless exercises or market sales of the purchased shares);

- buy or sell our securities pursuant to a Rule 10b5-1 trading program, as described in Section 8 below;

- make bona fide gifts. However, if you (1) have reason to believe that the recipient intends to sell our securities immediately or while you are aware of material nonpublic information, or (2) are subject to the pre-clearance procedures specified in Section 5 above and the sale by the recipient of our securities occurs during a blackout period, then the transaction is subject to this policy;\(^{23}\)

\(^{23}\) There is no clear binding legal authority governing whether a gift of securities could give rise to insider trading liability. Because Section 10(b) and Rule 10b-5 apply only to a purchase or sale, and a gift is neither a purchase nor a sale, counsel may conclude that a gift can occur when the donee is aware of material nonpublic information. However, if a donor knows that a charitable donee will typically sell the donated stock soon after the gift, such that the donee completes the sale while the donor is aware of material nonpublic information, a bona fide gift
• make purchases of the Company’s securities through your participation in the Company’s 401(k) plan, provided the purchases result from your periodic plan contributions pursuant to payroll deductions. This policy does apply, however, to certain elections you may make under the 401(k) plan, including elections: (1) to change the percentage of your periodic contributions that will be allocated to the Company stock fund; (2) to make a transfer of an existing account balance to or from the Company stock fund; (3) to borrow money against your 401(k) plan account to the extent the loan requires the sale of any securities underlying your Company stock fund balance; and (4) to pre-pay a plan loan if the pre-payment will result in allocation of loan proceeds to the Company stock fund;

• (1) purchase the Company’s securities in the Company’s employee stock purchase plan through your periodic contributions to the plan in accordance with the election you made at enrollment; and (2) purchase the Company’s securities through lump sum contributions to the plan, provided that you elected to participate by lump sum payment at the beginning of the applicable enrollment period. This policy does apply, however, to your election to participate in the plan for any enrollment period and to your sales of Company securities purchased pursuant to the plan;

• purchase the Company’s securities under the Company’s dividend reinvestment plan resulting from your reinvestment of dividends paid on the Company’s securities. Voluntary purchases of the Company’s securities resulting from additional contributions you make to the dividend reinvestment plan, and to your election to participate in the plan or increase your level of participation in the

could theoretically result in insider trading liability for the donor (and potentially the donee). Since, to our knowledge, no one has ever asserted such a claim, there appears to be a low level of risk in permitting bona fide gifts to occur while a covered person is aware of material nonpublic information or during a blackout period.
plan, are subject to this policy. This policy also applies to your sale of any of the Company’s securities purchased pursuant to the plan; and

- engage in any other purchase of Company securities from the Company or sale of Company securities to the Company.  

Additional guidelines and related requirements

8. Rule 10b5-1 trading plans

Rule 10b5-1 under the Exchange Act provides a defense from insider trading liability under Rule 10b-5. If persons subject to this policy wish to rely on this defense, they must enter into an approved Rule 10b5-1 trading plan as specified in Appendix 4 to this policy and meet certain conditions specified in the Rule. See Appendix 4 for more information.

9. Reports of purchases and sales

If you are a director, an executive officer, or another reporting person under Section 16 of the Exchange Act, (1) keep in mind the various restrictions on securities trading imposed under Section 16 of the Exchange Act and the applicable reporting requirements of the SEC, and (2) you must immediately report to a Compliance Officer all transactions made in our securities by you, any family members and any entities that you control subject to this policy. The report should be in the form of Appendix 5 to this policy. We require same-day reporting due to SEC requirements that certain insider reports be filed

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24 Although transactions in Company securities directly with the Company are unlikely to violate applicable insider trading rules, there may be other issues, including claims of fraud or breach of fiduciary duty.

25 If the company has separate Section 16 reporting policies or procedures established for Section 16 reporting persons, this section should be conformed to that policy or removed.
with the SEC by the second day after the date on which a reportable transaction occurs.  

10. Reports of unauthorized trading or disclosure

If you have supervisory authority over any of our personnel, you must immediately report to a Compliance Officer either any trading in our securities by our personnel or any disclosure of material nonpublic information by our personnel, in either case which you have reason to believe may violate this policy, the Company’s Regulation FD Corporate Communications Policy or applicable securities laws. Because the SEC can seek civil penalties against the Company, directors and supervisory personnel for failing to take appropriate steps to prevent illegal trading, we should be made aware of any suspected violations as early as possible.

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26 Some insider trading policies provide further disclosure and/or procedures for Section 16 compliance and sometimes even discuss Rule 144 and other restrictions on stock sales.

27 This provision should be viewed in consideration of, and conformed to the requirements of, the company’s Regulation FD and social media policies.
Disclosure restrictions

11. No tipping

You must not communicate material nonpublic information about the Company or other publicly traded companies, including our vendors, suppliers and customers, when that information is obtained in the course of employment with the Company or the performance of services on our behalf, to other persons (a practice known as “tipping”) before its public disclosure and dissemination by the Company or such other respective company. Therefore, you should exercise care when speaking with other personnel who do not have a “need to know” and when communicating with family, friends and others who are not associated with us, even if they are subject to this policy. To avoid even the appearance of impropriety, please refrain from discussing our business or prospects or making recommendations about buying or selling our securities or the

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28 The language in this section should be maintained and helps in assuring compliance with tipper/tippee insider trading laws and avoiding even the appearance of impropriety. However, a case of interest in this area is US v. Newman, 773 F.3d 438 (2d Cir. 2014). Prior to this ruling, under common law standards most prominently articulated in the Supreme Court’s insider trading decision, Dirks v. SEC, 463 US 646 (1983), the government’s burden of proof for “personal benefit” in tipper/tippee cases was much lower and required a bare minimum of facts alleged. In December 2014, in a controversial ruling, the Second Circuit held that to prove illegal insider trading between a tipper and tippee, the government has to show that the tipper received a benefit that is objective, consequential and potentially pecuniary and that the tippee knew of this benefit. It isn’t enough to allege that insider tips were passed to deepen a friendship or in exchange for career advice. While awaiting a decision from the US Supreme Court on whether it would review the controversial US v. Newman decision, in July 2015, the US Court of Appeals for the Ninth Circuit declined to extend the Newman ruling to US v. Salman, 792 F.3d 1087 (9th Cir. 2015). On October 5, 2015, the US Supreme Court declined to hear the government’s appeal of the Second Circuit’s Newman decision leaving intact the quid pro quo standard for showing that a tipper received the type of personal benefit sufficient to create criminal insider trading liability. At least for the foreseeable future, the Supreme Court’s certiorari denial of Newman means that the decision will reverberate in insider trading cases throughout the federal circuits. It is unclear to what extent other circuit courts will follow the Newman decision; however, the SEC and DOJ will have to satisfy the Newman standards to prove tipping insider trading cases in the Second Circuit, including those brought within the Southern District of New York, historically the favored venue for high profile securities prosecutions. Although both the SEC and DOJ have said that the evidentiary standards established in Newman could negatively impact their ability to bring insider trading actions, we believe they will continue to be vigilant in investigating individuals they believe traded on nonpublic information gained from insiders.
securities of other companies with which we have a relationship. This concept of unlawful tipping includes passing on information to friends, family members or acquaintances under circumstances that suggest that you were trying to help them make a profit or avoid a loss.

12. Internet message boards, chat rooms and discussion groups

In an effort to prevent unauthorized disclosure of our information, you are prohibited from posting or responding to any posting on or in Internet message boards, chat rooms, discussion groups, or other publicly accessible forums, with respect to us. Keep in mind that any inquiries about us should be directed to our [Investor Relations personnel].

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29 Consider adding a prohibition on the participation by directors, officers or other key employees in investment clubs that may invest in the company’s securities. For more information, see the SEC’s home page at http://www.sec.gov/investor/pubs/invclub.htm. This provision should be viewed in consideration of, and conformed to the requirements of, the company’s Regulation FD and social media policies.

30 Some smaller public companies may not have designated investor relations staff, in which case the CFO and/or CEO may serve this function. As applicable, insert a reference to the company’s social media policy.
Appendix 1: Questions and answers related to this policy

Why did the Company adopt this policy?

The Company’s Board of Directors has adopted this policy to promote compliance with federal and state securities laws that prohibit certain persons who are aware of material nonpublic information about a company from (1) trading in securities of that company, or (2) providing material nonpublic information to other persons who may trade on the basis of that information.

Who administers this policy?

[______] and [______] serve as the Compliance Officers for the purposes of administering this policy. All determinations and interpretations by a Compliance Officer are final and not subject to further review. A Compliance Officer’s approval of a transaction submitted for pre-clearance does not constitute legal advice, does not constitute confirmation that you do not possess material nonpublic information and does not relieve you of any of your legal obligations.

What information is “material”?

Information is considered material if a reasonable investor would consider that information important in making a decision to buy, hold or sell securities. Materiality involves a relatively low threshold. Any information that could be expected to affect the Company’s (or, in the case of information about another company, such other company’s) stock price, whether it is positive or negative, should be considered material. There is no bright-line standard for assessing materiality; rather, materiality is based on an assessment of all of the facts and circumstances, and is often evaluated by enforcement authorities with the benefit of hindsight. While it is not possible to define all
categories of material information, some examples of material information are: ¹

- Projections of future earnings or losses, or other earnings guidance;

- Changes to previously announced earnings guidance, or the decision to suspend earnings guidance;

- A pending or proposed merger, acquisition or tender offer;

- A pending or proposed acquisition or disposition of a significant asset;

- A pending or proposed joint venture;

- A Company restructuring;

- Significant related party transactions;

- A change in dividend policy, the declaration of a stock split, or an offering of additional securities;

- Bank borrowings or other financing transactions out of the ordinary course;

- The establishment of a repurchase program for the Company’s securities;

- A change in the Company’s pricing or cost structure;

- Major marketing changes;

- A change in management;

¹ This list should be adjusted to reflect information specific to a company’s particular circumstances. Modify, if necessary, to address events that may be material to the Company.
• A change in auditor or notification that the auditor’s reports may no longer be relied upon;

• Development (or release) of a significant new product, process or service;

• Pending or threatened significant litigation, or the resolution of such litigation;

• Impending bankruptcy or the existence of severe liquidity problems;

• The gain or loss of a significant customer or supplier;

• The imposition of a ban on trading in the Company’s securities or the securities of another company;

• Pending regulatory action;

• The public or private sale of additional securities; and

• A major license or other contract.

Unfortunately, no one can define in advance exactly what constitutes material information, since there are many gray areas and varying circumstances. Therefore, any trading is risky. When doubt exists, you should presume that the information is material and consult with one of the Compliance Officers prior to trading.

What information is “nonpublic”? 

Information that has not been disclosed to the public is generally considered to be nonpublic information. In order to establish that the information has been disclosed to the public, it may be necessary to demonstrate that the information has been widely disseminated. Information generally would be considered widely disseminated if it has been disclosed through the Dow Jones “broad tape,” newswire
services, a broadcast on widely available radio or television programs, published in a widely available newspaper, magazine or news website, or disclosed in documents filed with the SEC that are available on the SEC’s website. By contrast, information would likely not be considered widely disseminated if it is available only to the Company’s employees, or if it is only available to a select group of analysts, brokers and institutional investors. Once information is widely disseminated, it is still necessary to afford the investing public with sufficient time to absorb the information.

As a rule of thumb, information is considered nonpublic until at least [insert number] full trading days have passed after we release the information to a national wire service or file it with the SEC. For example, if an announcement is made on a Monday, trading should not occur until [insert appropriate day of the week]. The Compliance Officers will know when information has been released to the public.

If you are in possession of material nonpublic information, you may trade only when you are certain that official announcements of material information have been sufficiently publicized so that the public has had the opportunity to evaluate it. Keep in mind that insider trading is not made permissible merely because material information is reflected in rumors or other unofficial statements in the press or marketplace. You should not attempt to “beat the market” by trading simultaneously with, or shortly after, the official release of material nonpublic information.

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2 A company should review the SEC’s guidance in Rel. No. 34-58288 (August 1, 2008), as it may be able to conclude that disclosure on its website is sufficient to make the information public. A company should also review the April 2013 guidance on social media channels in the SEC’s Report of Investigation Pursuant to 21(a) of the Exchange Act: Netflix, Inc., and Reed Hastings, available at http://www.sec.gov/litigation/investreport/34-69279.pdf.

3 Conform to the number of days inserted in Section 4 of the policy above.
What if I can’t tell whether information is material or nonpublic?

If you are unsure whether information of which you are aware is material or nonpublic, you should consult with one of the Compliance Officers prior to trading. If you are a director, an executive officer or a Designated Employee, you must always consult with a Compliance Officer before trading, as outlined in this policy.

Whose transactions may be attributable to me?4

As discussed elsewhere herein, this policy applies to you, any family member and any other person who has a relationship with you (legal, personal or otherwise) that might reasonably result in that person’s transactions being attributable to you. This includes any legal entities that are influenced or controlled by you or other persons who have a relationship with you and are subject to this policy, such as corporations, partnerships or trusts. Your “family members” consist of people within your family who live with you, or are financially dependent on you, and also include other family members whose transactions in securities are directed by you or are subject to your influence or control. You may also be responsible for transactions by other persons with whom you share a residence or who consult with you before they trade in securities where those persons’ transactions might reasonably be attributable to you. In all cases, you must ensure that persons whose trading activities you directly or indirectly influence, or those whose trading activities would reasonably be perceived by others to be under your influence, comply with the terms of this policy.

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4 The reach of this policy should be tailored to the specific needs and circumstances of the Company.


What are the reasons for maintaining confidentiality?

Your failure to maintain the confidentiality of material nonpublic information could greatly harm our ability to conduct business. In addition, you could be exposed to significant civil and criminal penalties and legal action.

US federal securities laws strictly prohibit any person who obtains material inside information and who has a duty not to disclose it from using the information in connection with the purchase and sale of securities. It does not matter how that information has been obtained, whether in the course of employment or Board service, from friends, relatives, acquaintances, or strangers, or from overhearing the conversations of others. Congress enacted this prohibition because the integrity of the securities markets would be seriously undermined if the “deck were stacked” against persons who are not privy to this information.

What are some of the consequences of violating this policy?

Federal and state laws prohibit the purchase or sale of securities while aware of material nonpublic information, or the disclosure of material nonpublic information to others who then trade in the Company’s securities. The SEC, US Attorneys and state and foreign enforcement authorities vigorously pursue insider trading violations. Punishment for insider trading violations is severe and could include significant fines and imprisonment.

Individuals also may be prohibited from serving as directors or officers of the Company or any other public company. Keep in mind that there are no limits on the size of a transaction that will trigger insider trading liability; relatively small trades have more recently occasioned SEC investigations and lawsuits.5

5 See the SEC’s numerous press releases available at http://www.sec.gov/News/Page/List/Page/1356125649507 announcing insider trading
The federal securities laws also impose potential liability on companies and other “controlling persons” who fail to take appropriate steps to prevent illegal trading. Directors, officers and certain managerial personnel could become controlling persons subject to liability if they knew of, or recklessly disregarded, a likely insider trading violation by an employee or other personnel under their control.

In addition to the possible imposition of civil damages and criminal penalties on violators and their controlling persons, any appearance of impropriety could not only damage our reputation for integrity and ethical conduct but also impair investor confidence in us. For this reason, if you violate our policy, then we may take disciplinary action against you, including dismissal or removal for cause. Thus, even if the SEC does not prosecute a case, involvement in an investigation (by the SEC or us) can tarnish your reputation and damage your career.

**What measures are appropriate to safeguard material information?**

So long as material information relating to us or our business is unavailable to the general public, it must be kept in strict confidence. Accordingly, you should discuss this information only with persons who have a “need to know;” it should be confined to as small a group as possible, and it should be disclosed only in a setting in which confidentiality can be maintained. Please exercise utmost care and circumspection at all times and limit conversations in public places (such as elevators, restaurants and airplanes) to topics that do not involve sensitive or confidential information. In addition, all emails investigations, lawsuits and settlements (including the September 2014 release available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678) and the recent remarks and speeches by the Commissioners available at http://www.sec.gov/News/Page/List/Page/1356125649549 (including Chair Mary Jo White’s remarks at the Securities Enforcement Forum available at http://www.sec.gov/News/Speech/Detail/Speech/1370539872100).
containing sensitive or confidential information should be encrypted before being sent, and consideration should be given to making these emails non-copyable and non-forwardable.

In order to protect our confidences to the maximum extent possible, no individuals other than specifically authorized personnel may release material information to the public or respond to inquiries about material information from the media, analysts, or others outside the Company’s Regulation FD Corporate Communications Policy.\(^6\)

\(^6\) Conform to the Company’s Regulation FD corporate communications policy and social media policy. If feasible, consider listing here the names and/or positions of personnel who are authorized to speak for the Company.
Appendix 2: Certification¹

I certify to [Company Name] that:

• I have read and understand the policy on insider trading, as adopted on [date];

• I agree to comply with the policy, including any amendments of which I receive notice at any time or from time to time during the duration of my employment or other relationship with the company;

• I have complied with the policy for as long as it has applied to me; and

• I understand that any violation of this policy by me, my family members or any other persons who are subject to this policy because of their relationships with me may result in disciplinary action against me, including the termination of my employment or other relationship with the company and its subsidiaries, at the option of the company.

Signature: ________________________

Print name: ______________________

Date: ________________________ , 20___

¹ It is imperative that the Company provides adequate training for its employees about the policy and its restrictions. If employees simply sign a certification of receipt without understanding the mechanics, it does nothing to safeguard the Company. If the Company requires training, consider adding a certification that attests to attending an insider trading training session (either in person or Internet-based) where compliance with the policy was discussed and the ramifications of violations to the policy were considered. It is also encouraged to hold a Company “open house” for employees each time the policy is amended to permit persons subject to this policy to sit down with compliance personnel and ask questions regarding compliance with the policy.
Appendix 3: Designated employees

Our current Designated Employees for purposes of our policy on insider trading are:

[insert names and/or positions]

The Compliance Officers may alter this list of Designated Employees at any time, in which case one of the Compliance Officers will provide oral or written notice to any individuals to be added or removed from this list.
Appendix 4: Rule 10b5-1 trading plans

Rule 10b5-1 under the Exchange Act can protect officers, directors and other individuals from insider trading liability for transactions under a previously established contract, plan or instruction. This rule presents an opportunity for insiders to establish arrangements to sell (or purchase) our securities without the sometimes arbitrary restrictions imposed by closed trading periods - even when material nonpublic information exists. The arrangements may include blind trusts, other trusts, pre-scheduled stock option exercises and sales, pre-arranged trading instructions, and other brokerage and third-party arrangements.

The rule only provides an “affirmative defense” (which must be proven) if there is an insider trading lawsuit. It does not prevent anyone from bringing a lawsuit, nor does it prevent the media from writing about the sales.1 The program must be documented, bona fide and previously established (at a time when the insider did not possess inside information) and must specify the price, amount and date of trades or provide a formula or mechanism to be followed.

In order to reduce the risk of litigation and adverse press, and to preserve our reputation, if you would like to use such a trading program:

- a Compliance Officer must pre-approve your program (which would include any plan, arrangement, or trading instructions relating to our securities, such as blind trusts, discretionary accounts with banks or brokers, limit orders, hedging strategies,

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1 In fact media coverage of Rule 10b5-1 plans over the past few years has included headlines such as “Directors Take Shelter in Trading Plans,” Wall Street Journal, April 24, 2013, and “Insider-Trading Probe Trains Lens on Boards,” Wall Street Journal, April 30, 2013. For more information, including practical tips and guidelines for structuring 10b5-1 plans, see our archived Firm webinar “Rule 10b5-1 Plans Under Fire” available at http://www.bakermckenzie.com/files/Webinars/WBNARule10B51May13/lib/playback.html.
and other arrangements) at least [insert number] full trading days prior to entry into or modification of the plan;²

• you may not establish, modify or terminate the program during any closed trading periods or when you possess material nonpublic information,³ and

• if a 10b5-1 plan is terminated, you must wait at least [insert number] days before trading outside of the plan.⁴

You must still adhere to these procedures even where, for example, you are assured that the trading program that a brokerage firm or bank may be suggesting has been approved by its attorneys.

Establishing a trading program under Rule 10b5-1 is likely to implicate other laws, such as Section 16 of the Exchange Act and Rule 144 under the Securities Act of 1933, as amended. Under Section 16 generally, a report on Form 4 must be filed with the SEC by the second business day following the execution date of a transaction under a Rule 10b5-1 trading program. Recognizing that you may not know when a trade will be executed pursuant to a Rule 10b5-1 trading program, the SEC has provided a limited exception to this two-day deadline, with which you should be familiar if you establish such a program.

A transaction under a Rule 10b5-1 trading program could also be subject to short-swing profit recovery. Additionally, sales of our securities under Rule 144 may require the filing of a Form 144 with

² Five days is recommended.
³ Most plans typically provide for a waiting period after a plan is adopted before trading can begin. Practices vary by company but some include a waiting period of thirty days or a fiscal quarter, or adoption during the open window period after the next earnings release.
⁴ For a trading plan to be eligible for the 10b5-1 defense, the trading plan must be entered into with good faith. The SEC staff has said that terminating a 10b5-1 plan can be an indication of a lack of good faith. A waiting period is recommended between termination of a plan and first trading outside of a plan; practices vary but waiting periods typically range from thirty days to a fiscal quarter.
the SEC, which must be properly tailored to address sales under such a program. Therefore, if you establish such a program, we will need to establish a procedure with whoever is handling your transactions to ensure:

- timely filings of a Form 4 after a transaction has taken place (failure to file on time results in unwanted proxy statement disclosure of your filing violations); and

- compliance with Rule 144 at the time of any sale.

As mentioned above, Rule 10b5-1 is an SEC rule. There will be ongoing interpretations of what can and cannot be done. Needless to say, some brokers, investment bankers and advisers may approach you suggesting a variety of arrangements. You should consult your own tax and legal advisers before establishing a trading program under Rule 10b5-1.

Your notice to us is essential before establishing a Rule 10b5-1 trading program. If you have any questions, please contact a Compliance Officer.
Appendix 5: Transaction report

[Company Name]

To: Compliance Officer

Subject: Transaction report for securities of [Company Name]

Number of shares of common stock that I held before this transaction: ______________________________________________

Number and name of other [Company Name] securities that I held before this transaction:

________________________________________________________

On __________, 20__, these security holdings changed as follows:

<table>
<thead>
<tr>
<th>Number of shares of common stock:</th>
<th>Number of stock options:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date of transaction:</td>
<td>Date of transaction:</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>_____ acquired</td>
<td>_____ sold</td>
</tr>
<tr>
<td>_____ transferred</td>
<td>_____ other</td>
</tr>
<tr>
<td>_____ exercised</td>
<td>_____ other</td>
</tr>
</tbody>
</table>

If my acquisition or transfer was effected indirectly (for example: by or for my spouse or another family member; through an individual or entity who agreed with me to acquire or transfer the securities on my behalf; or by or for an entity of which I am a partner, director, officer, member, or 5% or greater stockholder), then, in addition to the above information, I have identified below the person through whom the transaction was effected and my relationship with that person:
Name of individual or entity: ____________________________

Relationship: ________________________________________

I certify that the above information is accurate and complete.

   Signature: _______________________

   Print name: _______________________

   Date: ___________________________

(This report should be provided as soon as possible on the date of the transaction. If applicable, a Form 4 will be prepared for your signature and filing with the SEC by the second day following the date of the transaction.)
Summary Memorandum of Section 16 and Rule 144 Reporting Provisions

This document is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice. All information in this document is subject to change and is current only as of October 2015.

TO: [Board of Directors] [Name and Title of Officer]¹

FROM: [______________]

SUBJECT: Summary of Section 16 and Rule 144 Reporting Provisions

DATE: ________________, 20___

¹ In analyzing which officers to designate as Section 16 Reporting Persons, consider the May 2013 opinion of the US District Court for the District of Columbia available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009cv1423-158, which gives examples of factors to consider when determining whether a person who does not hold one of the titles specified in Rule 16a-1(f) should nevertheless be considered an officer because he or she “performs a policy-making function for the issuer.” Additionally, in light of the rules proposed by the SEC in July 2015 to require the national securities exchanges and associations to establish listing standards that require public companies to adopt, implement and disclose a compensation clawback policy providing for recovery of excess incentive-based compensation from current and former executive officers, as mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, companies should consider that the SEC has modeled the definition of “executive officer” covered in the proposed rules on the definition of “officer” under Section 16 of the Exchange Act. Clawback policies are also to apply to both former and current “executive officers” who were such during the clawback period, which is three years. Companies may want to review and reassess the duties of their executive officers to be certain they are comfortable with those in the group likely becoming subject to the clawback rules once finalized and adopted by the SEC and stock exchanges.
This memorandum is an extremely simplified summary of the complex reporting and liability provisions of Section 16 (“Section 16”) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and of the reporting obligations under Rule 144 of the Securities Act of 1933, as amended (the “Securities Act”). You are cautioned that nearly all transactions involving the securities of [Company Name] (the “Company”) are subject to the reporting and liability provisions of Section 16, including, among others, transactions involving open market or privately negotiated purchases or sales, grants of restricted shares and restricted share units, grants or exercises of options or other derivative securities or phantom stock and the payment of the obligations by delivery or withholding of shares.

Please also be aware that transactions by spouses or family members living in the same household as a director or officer will be regarded as transactions by that director or officer for purposes of Section 16. In addition, transactions by trusts, partnerships, limited liability companies or other entities in which the director or officer is a trustee, beneficiary, partner, officer, director, member or shareholder may be regarded as transactions by that director or officer for purposes of Section 16.

This memorandum is being provided to you to ensure that you understand the reporting obligations that you have under Section 16 and Rule 144 regarding your ownership of the Company’s securities and to protect you and the Company from the consequences that may arise from failing to properly comply with these provisions.²

² Insider trading enforcement continues to be a high priority area and focus of the US Securities and Exchange Commission (SEC). See the SEC’s numerous press releases available at http://www.sec.gov/News/Page/List/Page/1356125649507 announcing insider trading investigations, lawsuits and settlements. Specifically, in September 2014, the SEC announced (http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678) charges against 28 officers, directors or major stockholders for failing to promptly report information about their holdings and transactions in company stock. Six public companies were also charged for contributing to filing failures by insiders or failing to report their insiders filing delinquencies. SEC enforcement staff used quantitative data sources and ranking algorithms to identify these insiders as repeatedly filing late. It is unusual for the SEC to bring so many actions at once; the
Additionally, please review the Company’s Policy on Insider Trading. Any director or officer should seek specific advice in advance before committing to any transaction involving securities of the Company.

Overview of Section 16

Section 16 was enacted in order to prevent potential abuses by corporate insiders from speculative “short-swing” trading in their corporation’s securities. For purposes of Section 16, the term “insiders” includes all executive officers and directors of the Company and beneficial owners of 10% of a class of the Company’s equity securities (“10% owners,” which, together with the executive officers and directors of the Company is referred to herein collectively as “Reporting Persons”). The Section 16 obligations and restrictions are in addition to the prohibition and liabilities of the general insider trading rules.

Section 16(b) holds Reporting Persons liable to the Company for any profits realized as a result of purchases and sales (or sales and purchases) of the Company’s securities within a six-month period, excluding certain exempt transactions. This is the so-called “short swing profit” rule. A suit to recover such profits may be brought by the Company or by any shareholder on behalf of the Company.

SEC continues to send a clear signal to insiders that the reporting requirements under the federal securities laws are not just suggestions but are legal obligations to be followed. For public companies that voluntarily assist insiders in complying with these filing requirements, the SEC’s enforcement actions make it clear that failure to comply with this voluntary responsibility carries with it serious consequences.

The Division of Corporation Finance at the SEC compiles and routinely updates Compliance and Disclosure Interpretations (“CDIs”) addressing Section 16. It is recommended to periodically consult the CDIs available at [http://www.sec.gov/divisions/corpfin/cfguidance.shtml](http://www.sec.gov/divisions/corpfin/cfguidance.shtml). On occasion, the SEC also issues Section 16 interpretive letters. These are issued much less frequently than the CDIs and can be located at [http://www.sec.gov/divisions/corpfin/cf-noaction.shtml#s16](http://www.sec.gov/divisions/corpfin/cf-noaction.shtml#s16). It is also recommended to periodically consult the SEC Staff Interpretations for Section 16 compliance.

Please see “Definition of Beneficial Ownership” for a discussion of the standards applicable to the determination of beneficial ownership under Section 16.
In order to monitor the application of Section 16(b), Section 16(a) requires Reporting Persons to file reports with the SEC with respect to their beneficial ownership of all securities of the Company and with respect to all transactions resulting in a change of such ownership.

Section 16 Reporting Obligations

Section 16 requires Reporting Persons to file reports electronically concerning changes in their beneficial ownership of securities of the Company (including options, warrants and other derivative securities) with the US Securities and Exchange Commission ("SEC"). These reports include Forms 3, 4 and 5, which are briefly described as follows:

- **Form 3.** An initial report on Form 3 of beneficial ownership of Reporting Persons must be filed within 10 calendar days after those persons become directors, officers or 10% owners.

- **Form 4.** In general, a report on Form 4 must be filed by the second business day following the “execution date” of most transactions which result in a change of beneficial ownership. The execution date is the date you become irrevocably committed to the transaction. A person who ceases to be a director or officer will continue to be required to file Form 4 reports for certain transactions for a period of six months from the date of the last change in beneficial ownership occurring while he or she was a director or officer.

- **Form 5.** Any Reporting Person at any time during the Company’s fiscal year must file a report on Form 5 within 45 days after the end of the Company’s fiscal year to report transactions that occurred during the prior fiscal year and were not required to be reported previously, such as gifts and inheritances, and all prior transactions that should have been reported but were not. A Form 5 is not required to be filed if a Reporting Person voluntarily reported Form 5 transactions (such as a gift) on a Form 4.
To foster compliance with these reporting obligations, the Company must disclose to its security holders in its Annual Report on Form 10-K or Proxy Statement the names of the directors, officers and 10% owners who file their reports late or fail to file them and the number of late or missed filings.

**Definition of Beneficial Ownership**

A Reporting Person must report ownership of and transactions in any securities that he or she “beneficially owns.” For purposes of Section 16, a Reporting Person is deemed to beneficially own any security from which he or she has a direct or indirect “pecuniary interest” (generally meaning the direct or indirect opportunity to share in the profit from the securities), other than in certain limited contexts. A Reporting Person is considered the direct beneficial owner of all securities held in the Reporting Person’s name or held jointly with others. A Reporting Person is considered the indirect beneficial owner of any securities from which he or she obtains benefits substantially equivalent to those of ownership. Thus, equity securities of the Company beneficially owned through partnerships, corporations, trusts, estates and family members may be beneficially owned by the Reporting Person and therefore subject to reporting. Absent countervailing facts, a Reporting Person is presumed to be the beneficial owner of securities held by his or her spouse and family members sharing his or her home. A Reporting Person is free, however, to disclaim beneficial ownership of these or any other securities being reported if there is a reasonable basis for doing so.

**Common Transactions That Trigger Section 16 Obligations**

The most common filing obligation under Section 16 is a Form 4. While virtually all transactions by an insider involving the Company’s securities are subject to the Form 4 reporting requirements, in the case of the Company, we expect that the most common transactions that you will be required to report would include:
• Open Market Transactions. Purchases or sales of the Company’s shares in open market transactions will generally be required to be reported on Form 4 on or before the second business day of the date of the trade (not the date on which the order is placed, and not the settlement date). Please be aware that these transactions may create liability to the officer and director for any “short-swing profit” from the transaction. Accordingly, while the insider should notify the Company of all transactions prior to the transaction, careful attention should be directed to these open market transactions.

• Grants of Equity Awards (Restricted Shares, Restricted Share Units and Options). The Company’s grant of equity awards is required to be reported on Form 4 on or before the second business day after the date of grant. In most cases, the date of grant will be the date the compensation committee or the board of directors approves the grant. Generally, if the grant is approved in advance by the compensation committee or full board of directors of the Company, then the grant is considered “exempt” for purposes of the liability provisions of Section 16. In other words, an exempt transaction should not create any “short-swing profit liability” under Section 16.

• Option Exercises. A director’s and an officer’s exercise of options to purchase shares is required to be reported on Form 4 on or before the second business day of the date of exercise. The date of exercise should be the date you deliver to the Company notice of exercise of the option and pay the exercise price. The vesting of options typically is a non-event for reporting and liability provisions of Section 16. Generally, if the option grant is approved in advance by the compensation committee or full board of directors of the Company, then the exercise is considered “exempt” for purposes of the liability provisions of Section 16. Therefore, an exempt transaction should not create any “short-swing profit liability” under Section 16.
The above transactions are descriptions of just a few of the more common transactions that a director or an officer will encounter. As a convenience, the Company may assist in the preparation and filing of Forms 3, 4 and 5 for its directors and officers. In order to comply with the complex filing requirements of Forms 3, 4 and 5, we recommend that Reporting Persons notify [General Counsel or Other Contact at Company] of any transactions dealing with Company securities at least 24 hours before the transaction. However, the ultimate responsibility for adhering to the requirements of Section 16 rests with each individual Reporting Person.

**Liability for Short-Swing Trading Profits Under Section 16**

Section 16(b) of the Exchange Act imposes liability on those Company insiders required to file reports on Forms 3, 4 and 5 with respect to any profit realized on a purchase and sale, or sale and purchase, of any equity security (including derivative securities such as non-exempt options or stock appreciation rights) of the Company within a period of *less than six months*. For the purpose of determining whether a profit has been realized, transactions within the six-month period are matched on the basis of the lowest purchase price and highest sales price to maximize recoverable profits. Accordingly, liability may exist under Section 16(b) even though the insider’s overall trading in the securities resulted in a net loss.

Even if the Company does not bring forth a claim for reimbursement, any Company shareholder can (and, as a result of a vigilant plaintiffs’ Bar, most likely will) assert a derivative claim for the benefit of the Company, and the Company insiders will still have to return the realized profit to the Company.

**Limitation on Sales of Company Securities by Affiliates (Rule 144)**

Rule 144 of the Securities Act applies to all Company securities held by affiliates, whether acquired in private transactions, on the open market or through equity awards, including the exercise of stock
options. You should treat yourself as an affiliate of the Company for Rule 144 purposes. The SEC has adopted complex rules for the attribution to affiliates of stock owned by persons or entities related to them.

[For NYSE companies: Rule 144 requires certain information concerning the Company to be publicly available, limits the amount of securities that may be sold within a three-month period, requires the mailing of a notice to the SEC concurrently with the placement of the sale order with a broker and restricts sales to usual “brokers’ transactions.”]

[For NASDAQ companies: Rule 144 requires certain information concerning the Company to be publicly available, limits the amount of securities that may be sold within a three-month period, requires the mailing of a notice to the SEC concurrently with the placement of the sale order with a broker or execution of the sale with a market maker and restricts sales to usual “brokers’ transactions” or transactions directly with a market maker.]

Rule 144 ordinarily should cause only a minor inconvenience in selling Company securities unless the amount of the proposed sale is substantial.

We trust the foregoing is helpful. Please note that the foregoing includes simplified discussions of complex US securities laws and does not address all the aspects of such rules and regulations. Please let us know if you have any questions or would like to discuss further.
Share Repurchase Memorandum and Materials

This document is not intended as a substitute for appropriate review or analysis of specific rule text. If you are not an attorney who is competent in this area of law, please consult with such an attorney before using this document. This document is for informational purposes only and may not be relied upon as legal advice.

All information in this document is subject to change and is current only as of October 2015.

TO: [______________]
FROM: [______________]
SUBJECT: Corporate Repurchase of Shares
DATE: ________________, 20____

The purpose of this memorandum is to discuss the key matters that should be considered and the steps that must be taken by [Company Name] (the “Company”) and its board of directors (the “Board”) in connection with any program for repurchasing Company stock in the open market. Before undertaking any such purchase, the Company should consult with Baker & McKenzie to ensure full compliance with all of the legal requirements applicable to the transaction.

I. Summary of Key Considerations

1. No Conflict with Corporate Requirements. Before undertaking any repurchase program, each of the following must be reviewed to determine if there are any restrictions or prohibitions on a repurchase program: (a) certificate of incorporation and bylaws; (b) all material contracts, including loan and other financing documents; (c) any outstanding orders, judgments, or other instruments or documents that may impact the ability to repurchase shares or distribute cash for that purpose; (d) any state corporation or other laws that might restrict the planned
repurchase program; and (e) any accounting or finance considerations that might impact the program.

2. **Corporate Purpose.** The Company must have a proper corporate purpose for repurchasing its securities in the marketplace. A decision to repurchase the Company’s own stock is within the discretion of the Board, unless restricted by the charter documents or agreements such as credit facilities.

- Repurchases where the Board believes that the Company’s stock is undervalued in the marketplace and that the repurchases will be beneficial to the Company are proper, but must comply with the securities law requirements outlined below.

- At the time the Board establishes the repurchase program, it must have a bona fide intention for the Company to repurchase stock. Otherwise, the Company could be subject to market manipulation charges under the federal securities laws.

- In most cases, the decision to repurchase securities is subject to and entitled to the presumptions of the business judgment rule, provided that the decision was not based primarily on the Board’s desire to maintain control of the Company.

3. **Summary of the 10b-18 Safe Harbor and Related Regulatory Requirements.**

- **Engage Brokerage Firm:** A company desiring to establish a repurchase program should enter into a formal engagement with a brokerage or investment banking firm (i.e., broker-dealer registered with the US Securities and Exchange Commission (the “SEC”)) to manage the repurchase program within the limits of SEC Rule 10b-18, explained here and in more detail in Section IV. Public company share repurchase programs are generally undertaken only pursuant to Rule 10b-18.
• **Safe Harbor**: Rule 10b-18 under the US Securities Exchange Act of 1934, as amended (the “Exchange Act”), creates a set of rules for the corporate repurchases that, if followed, create a “safe harbor” to avoid claims that the Company’s repurchases constitute illegal market manipulation. *This rule requires that only one brokerage firm be used on any single day to carry out the repurchases in accordance with detailed timing, price and volume limits that are designed to avoid undue impact on the market. See Section IV for further details.*

• **Purpose**: The purpose of the Rule 10b-18 safe harbor conditions is to allow the market to establish the share trading price based on independent market forces without undue influence by the Company.

• **Role of Banking Firm**: Most major investment banking firms have a specialized repurchase trading unit that is devoted only to repurchases. These units are trained to conduct repurchases in compliance with Rule 10b-18 limits and other applicable securities laws. The firm should be active in the stock [*for NASDAQ companies: (i.e., if the stock is quoted on NASDAQ, consider whether the firm selected should be a market maker for it)].

• **Formal Engagement Needed**: As part of the engagement letter, the investment bank will typically represent that it will execute only repurchase transactions that comply with the procedural requirements of Rule 10b-18. The repurchase trader and the authorized officers of the company will develop their own relationship. Some company officials like to get involved daily on a micro level with the repurchase trading unit, while others just set broad price parameters with the traders and check on a less frequent basis (e.g., weekly, etc.).

• **Purchases Outside of Safe Harbor**: *Although it is legally possible to structure share repurchases outside Rule 10b-18 and avoid illegal market manipulation, this is not recommended for routine*
share repurchase programs. A repurchase program outside of the safe harbor should not be undertaken without specific legal review.

- **Disclosure Obligations:** The SEC requires public companies to disclose, on a quarterly basis in a tabular form (in reports on Form 10-Q and for the 4th quarter in the Form 10-K), all share repurchases during each month of the quarter covered (reporting by month the total shares repurchased, average price paid, and a separate column showing total shares purchased under publicly announced plans), with a final column showing the maximum number of shares that may yet be purchased under any purchase plans or programs. *This covers all company share purchases within and outside Rule 10b-18.* A company must include footnotes with certain details, including announcement date, dollar amount approved, expiration date, each plan that has expired during the quarter, and each plan that the company has determined to terminate prior to expiration. When designing a repurchase program, companies should anticipate the detailed disclosures that are required to be made public. Additionally, the Company should consider discussing any repurchase program in its periodic reports under the “Liquidity and Capital Resources” section of its Management Discussion & Analysis of Financial Condition and Results of Operations (MD&A), as a repurchase plan could be considered to be a “known trend” or “commitment” that is reasonably likely to result in a material change to the Company’s liquidity. The Company should also consider whether disclosure is required in the footnotes to its financial statements.

- **Define Trading Windows for the Repurchase Program:** *As explained below, the Rule 10b-18 safe harbor does not relieve a company from liability if it repurchases shares when the company is aware of material nonpublic information.* A further practical decision that must be made in consultation with the brokerage

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1 See Item 703 of Regulation S-K.
firm handling the purchases is to (a) define the permitted open trading window for share repurchases (normally coincident with the Company’s regular open window) and (b) set up internal procedures to assure that if the Company becomes aware of material nonpublic information during an open window or is about to engage in a transaction that triggers a Regulation M restriction on Rule 10b-18 purchases (e.g., any use of shares in an exempt or public transaction to acquire another company or a planned public primary offering), the share repurchases are halted as and when required.

- **Define any Necessary Coordination with Insider Sales and Purchases:** The Company should consider halting the repurchase program during times when directors, officers and other affiliates are selling shares, although there is no specific prohibition on this. The Company should also review any planned purchases by insiders to determine whether these persons become “affiliated purchasers” (see Section IV.1(b)) whose sales are aggregated under the Rule 10b-18 limits. If the Company has insiders who have adopted Rule 10b5-1 trading plans, then the Company should review the timing and other aspects of these plans and likely trades under them in relation to any stock repurchase plan.

- **Define Required/Advisable Documentation:** (a) formal resolution of the Board; (b) press release announcing the program; (c) memorandum to affiliates restricting or coordinating their sales during a period that the Company is effecting repurchases; and (d) internal memorandum and communication to define and enforce open repurchase windows (or alternate adoption of written 10b5-1 plan covering the repurchases).

- **Notice and Filing with [NASDAQ] [NYSE]:** Give any required notice and make any filings required under the listing standards of

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2 It is important to remember that Rule 10b-18 is not an absolute shield from liability.
II. State Laws Governing Repurchases and Creditors Rights

Under the Delaware General Corporation Law (“DGCL”), a company cannot use cash or other property to repurchase its own shares of capital stock when the company’s capital is impaired, or when the repurchase would cause any impairment of the company’s capital. See Section 160 of the DGCL attached as Exhibit A. Companies incorporated under other laws should consult the specific section concerning distributions to stockholders and/or share repurchases.

• Generally, to avoid impairment of capital under Delaware law, a company may use only “surplus” to purchase shares of its own capital stock. “Surplus” is defined in DGCL Section 154 and means the excess of net assets (total assets minus total liabilities) over the aggregate par value of the outstanding stock.

• Most public companies undertaking share repurchase programs have substantial “surplus” and use only a small percentage of that surplus in the share repurchase program. If the book value of assets currently results in small surplus or one that might be impaired by a share repurchase program, Delaware case law may permit the company to “re-value” its assets to bona fide fair market value to measure surplus for this purpose. However, any such re-valuation or close measure of surplus is a matter beyond the scope of this memorandum, and no repurchase program should be implemented without specific legal and accounting review of this issue if the total repurchase program cost will exceed a small percentage of surplus based on existing book value. “Book value” means the carrying value of assets, typically at depreciated cost, that are reflected in the regular annual and quarterly balance sheets.
In addition, most companies are subject to state laws, that based on the Uniform Fraudulent Transfer Act, prohibit the use of corporate cash or assets for purposes of repurchasing stock if this would impair the ability of a company to pay its debts and liabilities as they become due or leave it with insufficient capital. This memorandum assumes a share repurchase program that will use a small percentage of available surplus and therefore does not raise any reasonable possibility that a company will not pay its debts and fixed and contingent liabilities as they become due. Companies with large short or long term debt in relation to current assets or with significant known contingent liabilities should analyze these aspects before committing any funds to a share repurchase program.

Directors may have personal liability (jointly and severally) to their company for the benefit of creditors and/or stockholders if they authorize an illegal share repurchase under applicable state laws. See, e.g., DGCL Section 174 that provides for personal liability of directors for negligent or willful violation of Section 160 under claims brought within six years after an unlawful stock repurchase.

Prior to undertaking any repurchase program, the Company should review its balance sheet and the guidelines set forth in DGCL Section 160 to ensure compliance.

III. Accounting Considerations and Treasury Stock

The Company should review in advance with an appropriate representative of its outside auditor and the Company’s principal accounting officer any accounting and finance concerns under the Company’s particular circumstances, including but not limited to the issues raised under Section II above.

Determine whether purchased shares will be treated as “treasury shares” or cancelled and restored to the status of “authorized but unissued shares.” This is reflected on the balance sheet depending
on which treatment is used. The Company should determine whether or not there are advantages to classifying shares as treasury shares (a kind of “fiction” to the effect that the Company has repurchased outstanding shares without canceling the shares, thereby preserving their status as outstanding shares). The Company should review the anticipated impact of any repurchase on the balance sheet, earnings per share and other financial aspects with appropriate accounting advisers. This memorandum does not cover these accounting issues.

- *Treasury shares have no special exemption or status under the securities laws.* A company cannot freely or simply resell treasury shares back into the market in routine trading (i.e., any such sale would be a public offering by the issuer that must first be registered as a primary offering on an appropriate form of registration statement with the SEC).

- Furthermore, while the NYSE previously allowed issuance of treasury shares to replenish equity plan share reserves without shareholder approval (it is unclear whether or not NASDAQ ever intended to permit this), there is no remaining “treasury stock” exception or grandfather provision for use of treasury stock to replenish equity plan reserves under the NYSE or NASDAQ equity compensation plan shareholder approval rules. As noted in the adopting release, “both the NYSE and NASDAQ proposals provide that a requirement that grants be made out of treasury or repurchased shares will not alleviate the need for shareholder approval for additional grants.”

### IV. Federal Securities Laws

1. **Anti Manipulation Provisions (Rule 10b-18).** The Exchange Act contains provisions that generally prohibit the manipulation of the market for a company’s securities by the company or by persons

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acting in concert with the company. Whenever a company or the individuals who control it purchase its stock on the open market, a risk exists that someone could claim that the market price is being illegally manipulated.

(a) **Rule 10b-18.** To allow open market purchases and yet avoid the risk of market manipulation, the SEC adopted Rule 10b-18 as a “safe harbor.” A copy of the rule is attached as Exhibit B.

- If purchases of stock on the open market conform to the guidelines in Rule 10b-18 (as generally summarized below), the purchases will not be deemed to have violated those portions of the Exchange Act prohibiting market manipulation.

- Rule 10b-18 does not protect a company against violations of the anti fraud provisions of Rule 10b-5 or of Regulation M (generally pertaining to repurchases during a public offering or other distribution). A company that repurchases its shares (i) while in possession of material, nonpublic information (e.g., merger negotiations) may be liable for fraudulent conduct under Rule 10b-5 (see Section IV.2), or (ii) during a registered public offering or “distribution” violates Regulation M (see Section IV.3).

- This summary is only for general informational purposes and is not to be used as the actual guide for permitted

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4 See [http://www.sec.gov/rules/final/33-8335.htm](http://www.sec.gov/rules/final/33-8335.htm) and the “frequently asked questions” publication [http://www.sec.gov/divisions/marketreg/r10b18faq0504.htm](http://www.sec.gov/divisions/marketreg/r10b18faq0504.htm) for a more detailed discussion. Also, in January 2010, the SEC proposed amendments to Rule 10b-18 of the Securities Exchange Act to modernize and clarify the safe harbor provisions in light of market developments. As of the date of this memorandum, the amendments have yet to be adopted. For more information, the text of the proposed amendments is available at [http://www.sec.gov/rules/proposed/2010/34-61414.pdf](http://www.sec.gov/rules/proposed/2010/34-61414.pdf). We recommend that you monitor the status of the proposed rules together with the Baker & McKenzie attorney with whom you work.
purchases. The rule is highly complex and must be administered by a specialized unit of a brokerage firm trained in the requirements of the rule.

(b) **Affiliated Purchasers Covered.** The provisions of Rule 10b-18 apply to purchases by the Company and by affiliated purchasers. An “affiliated purchaser” is one who acts in concert with the Company for the purpose of acquiring the Company’s stock or who controls the issuer’s purchases (e.g., brokers).⁵

(c) **Conditions to Safe Harbor of Rule 10b-18.** Rule 10b-18 requires four principal conditions of a stock repurchase program to qualify for the safe harbor:

(i) **Use of a Single Broker or Dealer on Any Single Day.** The Company (and all of its affiliated purchasers) must make all Rule 10b-18 purchases (a purchase of common stock by or for the Company or any affiliated purchaser of the Company), or any bid or limit order that would effect such purchase, through a single broker or dealer on any single day. More than one broker or dealer may be used only if the transactions are not solicited by or on behalf of the Company. The Company should engage a brokerage or investment banking firm to manage the repurchase program as outlined in Section I.3. Most companies have arrangements with multiple brokers or dealers, but the company must ensure that it only uses one broker or dealer on any given day pursuant to the rule.

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⁵ However, Rule 10b-18(a)(3)(ii) provides that “affiliated purchaser” shall not include a broker, dealer or other person solely by reason of such broker, dealer or other person effecting Rule 10b-18 purchases on behalf of the company or for its account, and shall not include an officer or director of the issuer solely by reason of that officer or director’s participation in the decision to authorize Rule 10b-18 purchases by or on behalf of the company.
(ii) **Timing of Purchase.** A repurchase of securities by a company cannot constitute the opening (regular way) purchase reported in the consolidated system in the security for any given day. Company repurchases of common stock are also prohibited during the 30 minutes prior to the scheduled close of the primary trading session in the principal market for the security (and 30 minutes prior to the scheduled close of the primary trading session in the market where the purchase is effected), except that the 30-minute limit is reduced to 10 minutes before close for a security that has an ADTV of US $1 million or more and a public float value of US $150 million or more. “ADTV” is defined in Rule 10b-18(a)(1) as “the average daily trading volume reported for the security during the four calendar weeks preceding the week in which the Rule 10b-18 purchase is to be effected.” There are other special exceptions relating to after-market trading.

(iii) **Price of Purchases.** The price paid for the security may not exceed (a) the highest independent bid or (b) the last independent transaction price, whichever is higher, quoted or reported at the time the Rule 10b-18 purchase is effected.

(iv) **Volume.**

- **25% Rule.** The maximum aggregate amount of any security that may be purchased on any given day by or for a company (or any affiliated purchaser of such company) may not exceed 25% of the ADTV. However, once each week, in lieu of purchasing under the 25% of ADTV limit for that day, the issuer or an affiliated purchaser may effect one block purchase if no other Rule 10b-18 purchases are effected that day, and the block purchase is not included when calculating a security’s four-week ADTV.
• **Definition of “Block Purchase”**. For the purposes of Rule 10b-18, a block purchase is defined as (i) a purchase with an aggregate price of at least US $200,000, (ii) a purchase of at least 5,000 shares with an aggregate price of at least US $50,000, or (iii) a purchase of at least 20 round lots of the security and totals 150% or more of the trading volume for that security. *Blocks may not, however, include any shares accumulated by a broker or dealer acting as principal with the intention of selling or reselling to a company or an affiliated purchaser that had reason to know that the broker or dealer was accumulating the common stock for that purpose.* In addition, a block cannot include shares sold short to the company by the broker or dealer if the company had reason to know that the sale was short.

(d) **Conditions Following Market-wide Trading Suspension.** The safe harbor protections afforded by Rule 10b-18 are available for all repurchases of securities by a company and any affiliated purchaser of the company effected after a market-wide trading suspension, i.e., a “circuit-breaker” trading halt. In such circumstance, the timing requirements of Rule 10b-18 (see Section IV.1(a)) are altered to allow for trades (i) from the opening of trading until the scheduled close of trading on the day the market-wide trading suspension is imposed, or (ii) at the opening of trading on the next trading day until the close of trading that day, if a market-wide trading suspension was in effect at the close of the preceding day’s trading session. The volume limit in this circumstance is also modified so that the amount of purchases must not exceed 100% of the ADTV for that security.

*Note:* The failure to comply with the foregoing guidelines will not result in a presumption that the Company has violated the market manipulation provisions in the Exchange Act.
2. **Anti Fraud Provisions (Rule 10b-5) and Possibility of Issuer Rule 10b5-1 Plan Covering Repurchases.** Rule 10b-5 prohibits the Company from repurchasing its shares when it possesses material, nonpublic information concerning the Company. Although compliance with Rule 10b-18 specifically neutralizes the *anti-manipulative features* of Rule 10b-5, the *anti-fraud features* of the rule remain applicable in all issuer repurchases whether they are in conformity with Rule 10b-18 or otherwise. Therefore, no repurchase of shares may be made by the Company if there exists material nonpublic information that would cause there to be a violation of Rule 10b-5.

- A company repurchasing its stock should be particularly sensitive to this issue, especially if it is involved in negotiations to make an acquisition that is “*significant*” within the meaning of instructions to Form 8-K,6 or otherwise is aware of material positive or negative news or circumstances that could affect the price of the stock. The Company should take all actions necessary or advisable to ensure compliance with Rule 10b-5.

- A company may also wish to consider using Rule 10b5-1(c)7 affirmative defenses to shield its repurchases from the Rule 10b-5 issue described above. There are two separate affirmative defenses under Rule 10b5-1, according to the SEC’s adopting release and subsequent interpretations. The two affirmative defenses are:

  - *a formal “trading plan”* adopted when the person is not aware of material nonpublic information and which provides for a specified formula or other means of making non-discretionary future purchases, which is

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6 Form 8-K is available at [http://www.sec.gov/about/forms/form8-k.pdf](http://www.sec.gov/about/forms/form8-k.pdf).

available to the Company as well as to other persons such as directors and officers; or

- a defense outlined in Rule 10b5-1(c)(2) which is only available to corporations and other non-natural persons who (a) delegate investment discretion to an individual who is not aware of the material nonpublic information, and (b) adopt formal policies which either black out transactions when there is nonpublic information or prevent the individual with purchasing authority from becoming aware of the nonpublic information.

- In its Rule 10b5-1 adopting release, the SEC notes: “For example, an issuer operating a repurchase program will not need to specify with precision the amounts, prices, and dates on which it will repurchase its securities. Rather, an issuer could adopt a written plan, when it is not aware of material nonpublic information, that uses a written formula to derive amounts, prices, and dates. Or the plan could simply delegate all the discretion to determine amounts, prices, and dates to another person who is not aware of the information – provided that the plan did not permit the issuer to (and in fact the issuer did not) exercise any subsequent influence over the purchases or sales.”

- A principal purpose for using Rule 10b5-1 would be to permit share repurchases during the period that the trading window is normally closed. A variation on this considered by some companies is a Rule 10b5-1 plan adopted at a proper time (when the Company is not aware of material nonpublic information) that only operates during the period following a quarter end through the earnings release date, and during the last month of each quarter (i.e., the normally closed window periods). Of course, there may be business reasons why neither of these defenses outlined above is desired or practical for a particular share repurchase program (e.g., the desire for control over the timing and amounts of repurchases may
outweigh the need to effect sales during a closed window period or a company may not wish to create the appearance of improper trading during normally closed windows even if the 10b5-1 defense is available due to a properly adopted plan). Also, these defenses require formal action carefully drafted and planned in advance, and must be analyzed under the specific requirements of Rule 10b5-1 (that are not outlined above). The above summary of the rule is not intended as a substitute for reviewing the specific requirements and is qualified by reference to the actual rule and existing and future SEC interpretations thereunder.

- Under the disclosure rules discussed under Section I.3, a company that repurchases stock (1) during the period covered by a quarterly report will have to give these details on a monthly basis in its quarterly reports, or (2) during one of the months of the last quarter will have to give these details on a monthly basis in its annual report and may need to consider in advance how it can explain such purchases in the absence of a written Rule 10b5-1 plan.

3. **Regulation M.** Regulation M\(^8\) of the Exchange Act precludes a company from purchasing its securities during periods when the company is deemed to be engaged in a “distribution.” Because Rule 10b-18 is not intended to apply in contexts where the issuer has a heightened incentive to manipulate the market price of its securities, *the safe harbor of Rule 10b-18 does not extend to issuer bids and purchases made during certain corporate events, for example, during mergers, tender offers, and distributions that involve the issuer.* The purpose of the summary in this Section IV.3 is only to alert the Company that if it is planning to use stock as all or part of the consideration in an acquisition or is planning to file a shelf registration or other primary offering, it should promptly review with legal counsel the detailed impact of

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Regulation M and Rule 10b-18 well in advance of announcing or filing any such transaction. This is not a detailed summary of these complex requirements.

(a) **Definition of Distribution.** For purposes of Regulation M, a “distribution” is defined as an offering of securities by a company, whether or not subject to registration under the US Securities Act of 1933, as amended, which is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods. A merger involving an exchange of securities is almost always deemed to be a distribution (whether or not the securities in question are registered or exempt from registration) and therefore Regulation M liability attaches to purchases of the issued security by the company during the distribution. Distributions include, without limitation, the following transactions:

(i) Registered public offerings;

(ii) Private placements;

(iii) Rights offerings; and

(iv) Mergers involving an exchange of securities.

(b) **Limitations on Timing of Stock Repurchases.** To avoid liability under Regulation M during periods when a company is in the process of a distribution of its shares in a merger or other acquisition, registered primary offering or any other “distribution,” a company’s securities repurchase program must be monitored and the purchase of its securities must cease during the required periods. This restriction in the context of primary public offerings should be part of the legal review and planning for the offering and is not discussed in this memorandum. The restricted period for mergers or acquisitions is from the time of public announcement of a
merger, acquisition or similar transaction involving a recapitalization, until the earlier of the completion of such transaction or the completion of the vote by target shareholders. However, this restriction does not apply to Rule 10b-18 purchases in connection with mergers or other acquisitions:

(i) Effected during such transaction in which the consideration is solely cash and there is no valuation period; or

(ii) Where: (A) the total volume of Rule 10b-18 purchases effected on any single day does not exceed the lesser of 25% of the security’s four-week ADTV or the issuer’s average daily Rule 10b-18 purchases during the three full calendar months preceding the date of the announcement of such transaction; (B) the issuer’s block purchases effected pursuant to paragraph (b)(4) of Rule 10b-18 (regarding volume of purchases) do not exceed the average size and frequency of the issuer’s block purchases effected pursuant to paragraph (b)(4) of Rule 10b-18 during the three full calendar months preceding the date of the announcement of such transaction; and (C) such purchases are not otherwise restricted or prohibited (see Regulation M for interpretation of this last restriction and required blackout, generally on the first day proxy materials are sent and through the vote).

V. Accelerated Stock Repurchase Programs

An accelerated stock repurchase program (“ASR Program”) allows a company to quickly reduce the number of its outstanding shares. An ASR Program is effected through the following steps:

- A company purchases shares of its own common stock from an investment bank at a set price. The set price may be based on the
closing market price on the date selected for the repurchase. The company pays the investment bank at that time.

- The investment bank and the company then enter into a forward contract; the investment bank has the risk for covering the short position in the stock but is compensated by the company which has paid a negotiated premium for the shares. The term of the forward contract is typically anywhere from 30 to 360 days.

- The investment bank borrows the shares from its clients for the company to purchase and then tries to purchase shares of the company from the market to return to its clients. During the time period that it is buying shares through open market purchases, the investment bank maintains a short position in the shares.

- The company’s repurchase is typically subject to a financial adjustment based on the volume-weighted average price, less a discount, of the shares the bank subsequently buys during the repurchase period.

- At the end of the contract term, the company and the investment bank settle the forward contract in cash or shares. If the average share price paid for the shares bought by the bank is greater than the initial purchase price that the company paid, the company must give the bank cash or shares equal to the difference in price multiplied by the number of shares acquired by the bank. Conversely, if the average market price paid is less than the initial purchase price, the bank is obligated to deliver cash or shares to the company.

An ASR Program is different than a typical open market repurchase program in the following respects:

- Forward contracts are required for an ASR Program.

- Implementation of an ASR Program immediately results in a decrease in the number of outstanding shares of the company.
• Weighted-average price considerations in the forward contract may require the company to issue additional shares (or pay cash) to the investment bank at the end of the ASR Program.

• *An ASR Program and forward contracts are private (off-market) transactions and are not covered by the safe harbor provisions of Rule 10b-18. As previously noted above, a repurchase program outside of the safe harbor provisions should not be undertaken without specific legal review.*

• Brokers executing open market repurchases are covered by Rule 10b-18 so long as the time, volume and price provisions are met. However, brokers involved in an ASR Program are not covered by the safe harbor (on the basis that the trades are not riskless principal trades effected on behalf of the issuer).

**VI. Increased Ownership by Stockholders — Section 16(b) and Regulation 13D**

As a repurchase program proceeds, both the stockholders and the Company should monitor the impact of the program on the outstanding number of shares of the Company’s common stock. Larger stockholders should be made aware that the repurchase program will reduce the number of shares outstanding and, consequently, stockholders who do not sell their shares will see their respective percentage ownership in the Company increase. If these repurchases cause a stockholder’s ownership interest to increase to over 5% of the outstanding shares, the reporting requirements of Regulation 13D will be triggered, which will require filing a Schedule 13D or, in the case of certain passive 20% or less shareholders, the less onerous Schedule 13G. If the repurchase program causes a stockholder’s ownership to exceed 10% of the outstanding shares, the stockholder will be required to file a Form 3 and will be subject to the periodic filing requirements of Section 16(a) and the short-swing trading prohibitions of Section 16(b) (unless certain exemptions apply, e.g., for mutual funds).
VII. Decrease in Public Float

Stock repurchases reduce a company’s “public float,” which is the number of shares that are not held directly or indirectly by any officer or director of a company and by any person who is the beneficial owner of more than 10% of the total shares outstanding. If a company reduces its public float too much, it may be less attractive to investors and the analyst community. A shrinking public float may also make a company ineligible for primary offerings on Form S-3, which is the SEC’s short-form registration statement. Further, [NASDAQ][the NYSE] requires listed companies to maintain a certain minimum public float as well as other distribution criteria. Companies that are not widely held should consider these public float requirements before initiating a repurchase program.

VIII. Tender Offer Rules (Rule 13e-4)

Rule 13e-4 under the Exchange Act is the principal rule governing self-tender offers. Most repurchase programs do not constitute tender offers because the repurchases are made on the open market at prevailing market prices (not at a premium above market prices) and the repurchase program does not involve any solicitation of sellers. Nonetheless, the Company should take care to ensure that its repurchase program is not deemed to be a tender offer subject to Rule 13e-4 and Regulation 14E under the Exchange Act. Eight factors are generally used to determine if a tender offer exists:

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9 Eligibility requirements for use of Form S-3 permit companies (excluding shell companies) with less than a US$75 million public float to conduct primary securities offerings on Form S-3 without regard to the size of their public float or the rating of debt they are offering, so long as they satisfy the other eligibility conditions of Form S-3, have a class of common equity securities listed and registered on a national securities exchange, and the issuers do not sell more than the equivalent of one third of their public float in primary offerings over any period of 12 calendar months.

10 The complete text of Rule 13e-4 is available at http://www.sec.gov/divisions/corpfin/cfrules.shtml.
1. whether there is an active and widespread solicitation of stockholders;

2. whether the solicitation is made for a substantial percentage of a company’s stock;

3. whether the offer is made at a premium over the prevailing market price;

4. whether the terms of the offer are firm rather than negotiable;

5. whether the offer is contingent upon the tender of a fixed maximum number of shares and/or is subject to a ceiling of a fixed maximum number of shares to be repurchased;

6. whether the offer is open for only a limited time;

7. whether the offerees are subjected to pressure to sell; and

8. whether public announcements of a purchase program precede or accompany a rapid accumulation of large amounts of the company’s stock.

Self-tender offers are avoided by many companies because they require both the payment of a premium and compliance with the disclosure and procedural requirements of Rule 13e-4 and Regulation 14E.

**IX. “Going Private” Transactions**

Rule 13e-3\(^\text{11}\) under the Exchange Act governs “going private” transactions, which are repurchase transactions that have the purpose or effect of reducing the number of stockholders to such a level (less than 300 holders) that the stock would no longer need to be registered.

under the Exchange Act or would be delisted from its principal trading market. Most repurchase programs do not constitute “going private” transactions because they usually seek to repurchase only a modest number of the outstanding shares.

X. Listing Standard Considerations

The Company’s common stock is currently listed on the [NASDAQ] [NYSE]. As such, the broker or dealers who engage in the purchases are subject to regulation. The broker or dealer selected to manage the repurchase program may have specific obligations to telephone the [NASDAQ] [NYSE] to advise that the Company has begun a repurchase program. The Company should carefully coordinate the entire repurchase program with the broker or dealer to ensure Company compliance with [NASDAQ] [NYSE] rules.

[for NASDAQ companies: A stock repurchase plan is the type of material new development that must be disclosed to the public pursuant to Marketplace Rule 5250. Prior to disclosure to the public, the Company must notify the NASDAQ MarketWatch Department through the electronic disclosure submission system available at www.NASDAQ.net.]13

[for NASDAQ companies: NASDAQ also requires that if repurchases cause a decrease of any class of securities that exceeds 5% of the amount of the securities of the class outstanding as last reported, then the Company must file with NASDAQ a form entitled “NASDAQ

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12 The company must provide NASDAQ with at least 10 minutes prior notification when releasing material information to the public between 7:00 a.m. and 8:00 p.m. ET. If releasing outside of these hours, notification must be given prior to 6:50 a.m. ET. See Marketplace Rule 5250.

Notification Form: Change in the Number of Shares Outstanding” within 10 days following such a decrease.]\(^{14}\)

\textbf{[for NYSE companies]:} The NYSE considers the implementation of a repurchase program to be material information requiring disclosure pursuant to Section 202.05 and 202.06 of the NYSE Listed Company Manual.]\(^{15}\)

\textbf{[for NYSE companies]:} If a listed company re-acquires any issued and listed stock for the account of the company, the NYSE must receive notice of such transaction within 10 days after the close of the fiscal quarter in which it occurs (see Section 204.25 of the NYSE Listed Company Manual). The notice must state “only the total amount reacquired or disposed of during the quarter and the balance held by the company at the end of the quarter. If, during such quarter, there were both re-acquisitions and dispositions, the total amount re-acquired and the total amount disposed of should be stated.”\(^{15}\)

\textbf{[for other exchange-listed companies]:} Additionally, the Company should comply with the requirements imposed on it by its listing agreement with the stock exchange on which its common stock is listed. These requirements include releasing to the public any news or information that might reasonably be expected to materially affect the market, such as announcing a repurchase program and periodic reports as to the shares repurchased.]

\(^{14}\) This Notification must be filed electronically through the NASDAQ Listing Center. See https://listingcenter.nasdaq.com/home.aspx?ReturnUrl=%2fdashboard.aspx.

\(^{15}\) See http://nysemanual.nyse.com/LCM/sections/. See also, the NYSE’s amendments to Rule 202.06, effective September 26, 2015, expanding the pre-market hours during which listed companies are required to notify the NYSE prior to disseminating material news, providing the NYSE with authority to halt trading in pre-market hours under certain circumstances, and providing guidance related to the release of material news after the close of trading on the NYSE.
XI. Implementation of the Repurchase Program

1. **Approval by the Board.** The repurchase program should be approved by the Board. Form Director Resolutions are attached as Exhibit C for your convenience. Please note that when shares of a company incorporated in Delaware are repurchased, they become treasury shares (i.e., issued but not outstanding shares held by the company) unless retired and restored to the status of authorized and unissued shares pursuant to Section 243 of the DGCL. Treasury shares cannot be voted and cannot be counted in computing the number of shares necessary for a quorum. Some companies immediately retire repurchased shares. See discussion of this issue in Section III. Also, the time period during which repurchases may be made (usually a 12 to 18 month period) may be specified in the resolutions, although some companies opt not to include a specific termination date in the resolutions. The repurchase program does not need to be approved by the stockholders of the Company.

2. **Disclosure of Plan.** Prior to implementing a stock purchase program, companies typically issue a press release indicating the following information, assuming no other material inside information exists: (i) the maximum number of shares intended to be purchased (or maximum funds to be expended); (ii) the period during which purchases would be effected; (iii) the purpose for the acquisition of the shares; and (iv) the manner in which the shares will be purchased (i.e., in the market at prevailing prices). Although it may be tempting to include a long marketing quote from management regarding how the stock is undervalued, it is inadvisable to do so given the risk that market manipulation claims could follow. Brief quotations regarding the reasons for the buyback, however, are not uncommon. The content of the press release should be furnished as part of a Form 8-K (Item 8.01 with press release attached as Item 9.01 exhibit) with the SEC and a form of such announcement is attached as Exhibit D. Please see Section X regarding public disclosure.
pursuant to the [NYSE/NASDAQ] announcing a repurchase program.

3. **Selection of Broker-Dealer.** A single broker-dealer should be retained to supervise the repurchase program and should confirm in writing the terms of its engagement. The broker-dealer should agree to be bound by the conditions of Rule 10b-18 and any affiliated purchasers should be advised either to desist from repurchases or to advise the broker-dealer before making such purchases.

4. **Affiliate Trading.** We have prepared a form of memorandum that may be distributed to each of the affiliates of the Company regarding the timing of sales of Company stock by them in order to prevent inadvertent noncompliance with the requirements addressed in this memorandum. Please tailor the memorandum to the particular set of communications and restrictions you desire to apply to insider purchases and sales that may occur during the repurchase program. A sample form of the memorandum to affiliates is attached as Exhibit E.

- The Company should consider the impact of possible affiliate sales or purchases during the period that the Company is effecting repurchases. Generally, companies endeavor to avoid effecting purchases of shares at the same times that insiders are selling shares. Consult the brokerage firm engaged to manage the repurchases concerning common approaches to this aspect.

- Consider the impact of potential insider purchasers on the affiliated purchaser definition in Rule 10b-18.

- Consider the impact of any 10b5-1 trading plans adopted or to be adopted by insiders in light of the planned stock repurchase program.
XII. Conclusion

Although there are many legal requirements and issues applicable to stock repurchase programs, such programs are frequently adopted by many companies for various reasons. Generally, these programs are not difficult to structure, adopt and implement, but a company must allow sufficient time to review applicable legal issues and take all appropriate steps to avoid legal pitfalls.

We trust the foregoing is helpful. Please note that this memorandum is a simplified discussion of complex US federal securities laws. This memorandum does not address all the aspects of the rules and regulations discussed herein. Please contact us at anytime with any questions or if you would like to discuss.
Exhibit A

Delaware General Corporation Law

Section 160: Corporation’s powers respecting ownership, voting, etc., of its own stock; rights of stock called for redemption.

(a) Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares; provided, however, that no corporation shall:

(1) purchase or redeem its own shares of capital stock for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation, except that a corporation, other than a nonstock corporation, may purchase or redeem out of capital any of its own shares which are entitled upon any distribution of its assets, whether by dividend or in liquidation, to a preference over another class or series of its stock, or, if no shares entitled to such a preference are outstanding, any of its own shares, if such shares will be retired upon their acquisition and the capital of the corporation reduced in accordance with §§243 and 244 of this title. Nothing in this subsection shall invalidate or otherwise affect a note, debenture or other obligation of a corporation given by it as consideration for its acquisition by purchase, redemption or exchange of its shares of stock if at the time such note, debenture or obligation was delivered by the corporation its capital was not then impaired or did not thereby become impaired;

(2) purchase, for more than the price at which they may then be redeemed, any of its shares which are redeemable at the option of the corporation; or
(3)(a) In the case of a corporation other than a nonstock corporation, redeem any of its shares unless their redemption is authorized by §151(b) of this title and then only in accordance with such section and the certificate of incorporation, or

(b) In the case of a nonstock corporation, redeem any of its membership interests, unless their redemption is authorized by the certificate of incorporation and then only in accordance with the certificate of incorporation.

(b) Nothing in this section limits or affects a corporation’s right to resell any of its shares theretofore purchased or redeemed out of surplus and which have not been retired, for such consideration as shall be fixed by the board of directors.

(c) Shares of its own capital stock belonging to the corporation or to another corporation, if a majority of the shares entitled to vote in the election of directors of such other corporation is held, directly or indirectly, by the corporation, shall neither be entitled to vote nor be counted for quorum purposes. Nothing in this section shall be construed as limiting the right of any corporation to vote stock, including but not limited to its own stock, held by it in a fiduciary capacity.

(d) Shares which have been called for redemption shall not be deemed to be outstanding shares for the purpose of voting or determining the total number of shares entitled to vote on any matter on and after the date on which written notice of redemption has been sent to holders thereof and a sum sufficient to redeem such shares has been irrevocably deposited or set aside to pay the redemption price to the holders of the shares upon surrender of certificates therefor.
Exhibit B

Rule 10b-18 -- Purchases of Certain Equity Securities by the Issuer and Others.

Preliminary Notes to Rule 240.10b-18

1. Section 240.10b-18 provides an issuer (and its affiliated purchasers) with a “safe harbor” from liability for manipulation under Sections 9(a)(2) of the Act and Section 240.10b-5 under the Act solely by reason of the manner, timing, price, and volume of their repurchases when they repurchase the issuer’s common stock in the market in accordance with the section’s manner, timing, price, and volume conditions. As a safe harbor, compliance with Section 240.10b-18 is voluntary. To come within the safe harbor, however, an issuer’s repurchases must satisfy (on a daily basis) each of the section’s four conditions. Failure to meet any one of the four conditions will remove all of the issuer’s repurchases from the safe harbor for that day. The safe harbor, moreover, is not available for repurchases that, although made in technical compliance with the section, are part of a plan or scheme to evade the federal securities laws.

2. Regardless of whether the repurchases are effected in accordance with Section 240.10b-18, reporting issuers must report their repurchasing activity as required by Item 703 of Regulations S-K and S-B (17 CFR 229.703 and 228.703) and Item 15(e) of Form 20-F (17 CFR 249.220f) (regarding foreign private issuers), and closed-end management investment companies that are registered under the Investment Company Act of 1940 must report their repurchasing activity as required by Item 8 of Form N-CSR (17 CFR 249.331; 17 CFR 274.128).

   a. Definitions. Unless otherwise provided, all terms used in this section shall have the same meaning as in the Act. In addition, the following definitions shall apply:
1. *ADTV* means the average daily trading volume reported for the security during the four calendar weeks preceding the week in which the Rule 10b-18 purchase is to be effected.

2. *Affiliate* means any person that directly or indirectly controls, is controlled by, or is under common control with, the issuer.

3. *Affiliated purchaser* means:
   
   i. a person acting, directly or indirectly, in concert with the issuer for the purpose of acquiring the issuer’s securities; or

   ii. an affiliate who, directly or indirectly, controls the issuer’s purchases of such securities, whose purchases are controlled by the issuer, or whose purchases are under common control with those of the issuer; *Provided, however*, that “affiliated purchaser” shall not include a broker, dealer, or other person solely by reason of such broker, dealer, or other person effecting Rule 10b-18 purchases on behalf of the issuer or for its account, and shall not include an officer or director of the issuer solely by reason of that officer or director’s participation in the decision to authorize Rule 10b-18 purchases by or on behalf of the issuer.

4. *Agent independent of the issuer* has the meaning contained in §242.100 of this chapter.

5. *Block* means a quantity of stock that either:

   i. has a purchase price of US $200,000 or more;

   ii. is at least 5,000 shares and has a purchase price of at least US $50,000; or
iii. is at least 20 round lots of the security and totals 150% or more of the trading volume for that security or, in the event that trading volume data are unavailable, is at least 20 round lots of the security and totals at least one-tenth of 1% (.001) of the outstanding shares of the security, exclusive of any shares owned by any affiliate;

*Provided, however*, that a block under paragraph (a)(5)(i), (ii), and (iii) shall not include any amount a broker or dealer, acting as principal, has accumulated for the purpose of sale or resale to the issuer or to any affiliated purchaser of the issuer if the issuer or such affiliated purchaser knows or has reason to know that such amount was accumulated for such purpose, nor shall it include any amount that a broker or dealer has sold short to the issuer or to any affiliated purchaser of the issuer if the issuer or such affiliated purchaser knows or has reason to know that the sale was a short sale.

6. *Consolidated system* means a consolidated transaction or quotation reporting system that collects and publicly disseminates on a current and continuous basis transaction or quotation information in common equity securities pursuant to an effective transaction reporting plan or an effective national market system plan (as those terms are defined in §242.6001 of this chapter).

7. *Market-wide trading suspension* means a market-wide trading halt of 30 minutes or more that is:

   i. imposed pursuant to the rules of a national securities exchange or a national securities association in

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response to a market-wide decline during a single trading session; or

ii. declared by the Commission pursuant to its authority under Section 12(k)² of the Act.

8. Plan has the meaning contained in §242.100 of this chapter.

9. Principal market for a security means the single securities market with the largest reported trading volume for the security during the six full calendar months preceding the week in which the Rule 10b-18 purchase is to be effected.

10. Public float value has the meaning contained in §242.100 of this chapter.

11. Purchase price means the price paid per share as reported, exclusive of any commission paid to a broker acting as agent, or commission equivalent, mark-up, or differential paid to a dealer.

12. Riskless principal transaction means a transaction in which a broker or dealer after having received an order from an issuer to buy its security, buys the security as principal in the market at the same price to satisfy the issuer’s buy order. The issuer’s buy order must be effected at the same price per-share at which the broker or dealer bought the shares to satisfy the issuer’s buy order, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee. In addition, only the first leg of the transaction, when the broker or dealer buys the security in the market as principal, is reported under the rules of a self-regulatory

² Section 12(k) is available at http://www.sec.gov/divisions/corpfin/cfrules.shtml.
organization or under the Act. For purposes of this section, the broker or dealer must have written policies and procedures in place to assure that, at a minimum, the issuer’s buy order was received prior to the offsetting transaction; the offsetting transaction is allocated to a riskless principal account or the issuer’s account within 60 seconds of the execution; and the broker or dealer has supervisory systems in place to produce records that enable the broker or dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders effected on a riskless principal basis.

13. **Rule 10b-18 purchase** means a purchase (or any bid or limit order that would effect such purchase) of an issuer’s common stock (or an equivalent interest, including a unit of beneficial interest in a trust or limited partnership or a depository share) by or for the issuer or any affiliated purchaser (including riskless principal transactions). However, it does not include any purchase of such security:

i. effected during the applicable restricted period of a distribution that is subject to §242.10233 of this chapter;

ii. effected by or for an issuer plan by an agent independent of the issuer;

iii. effected as a fractional share purchase (a fractional interest in a security) evidenced by a script certificate, order form, or similar document;

iv. effected during the period from the time of public announcement (as defined in §230.165(f)) of a

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merger, acquisition, or similar transaction involving a recapitalization, until the earlier of the completion of such transaction or the completion of the vote by target shareholders. This exclusion does not apply to Rule 10b-18 purchases:

A. effected during such transaction in which the consideration is solely cash and there is no valuation period; or

B. where:

1. The total volume of Rule 10b-18 purchases effected on any single day does not exceed the lesser of 25% of the security’s four-week ADTV or the issuer’s average daily Rule 10b-18 purchases during the three full calendar months preceding the date of the announcement of such transaction;

2. The issuer’s block purchases effected pursuant to paragraph (b)(4) of this section do not exceed the average size and frequency of the issuer’s block purchases effected pursuant to paragraph (b)(4) of this section during the three full calendar months preceding the date of the announcement of such transaction; and

3. Such purchases are not otherwise restricted or prohibited.

v. effected pursuant to §240.13e-1;\(^4\)

vi. effected pursuant to a tender offer that is subject to §240.13e-4 or specifically excepted from §240.13e-4; or

vii. effected pursuant to a tender offer that is subject to Section 14(d) of the Act and the rules and regulations thereunder.

b. **Conditions to be met.** Rule 10b-18 purchases shall not be deemed to have violated the anti-manipulation provisions of sections 9(a)(2) or 10(b) of the Act or §240.10b-5 under the Act, solely by reason of the time, price, or amount of the Rule 10b-18 purchases, or the number of brokers or dealers used in connection with such purchases, if the issuer or affiliated purchaser of the issuer effects the Rule 10b-18 purchases according to each of the following conditions:

1. **One broker or dealer.** Rule 10b-18 purchases must be effected from or through only one broker or dealer on any single day; *Provided, however,* that:

   i. the “one broker or dealer” condition shall not apply to Rule 10b-18 purchases that are not solicited by or on behalf of the issuer or its affiliated purchaser(s);

   ii. where Rule 10b-18 purchases are effected by or on behalf of more than one affiliated purchaser of the issuer (or the issuer and one or more of its affiliated purchasers) on a single day, the issuer and all affiliated purchasers must use the same broker or dealer; and

   iii. where Rule 10b-18 purchases are effected on behalf of the issuer by a broker-dealer that is not an

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electronic communication network (ECN) or other alternative trading system (ATS), that broker-dealer can access ECN or other ATS liquidity in order to execute repurchases on behalf of the issuer (or any affiliated purchaser of the issuer) on that day.

2. *Time of purchases.* Rule 10b-18 purchases must not be:

i. the opening (regular way) purchase reported in the consolidated system;

ii. effected during the 10 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 10 minutes before the scheduled close of the primary trading session in the market where the purchase is effected, for a security that has an ADTV value of US $1 million or more, and a public float value of US $150 million or more; and

iii. effected during the 30 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 30 minutes before the scheduled close of the primary trading session in the market where the purchase is effected, for all other securities.

iv. However, for purposes of this section, Rule 10b-18 purchases may be effected following the close of the primary trading session until the termination of the period in which last sale prices are reported in the consolidated system so long as such purchases are effected at prices that do not exceed the lower of the closing price of the primary trading session in the principal market for the security and any lower bids or sale prices subsequently reported in the consolidated system, and all of this section’s
conditions are met. However, for purposes of this section, the issuer may use one broker or dealer to effect Rule 10b-18 purchases during this period that may be different from the broker or dealer that it used during the primary trading session. However, the issuer’s Rule 10b-18 purchase may not be the opening transaction of the session following the close of the primary trading session.

3. **Price of purchases.** Rule 10b-18 purchases must be effected at a purchase price that:

   i. does not exceed the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system at the time the Rule 10b-18 purchase is effected;

   ii. for securities for which bids and transaction prices are not quoted or reported in the consolidated system, Rule 10b-18 purchases must be effected at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, displayed and disseminated on any national securities exchange or on any inter-dealer quotation system (as defined in §240.15c2-11) that displays at least two priced quotations for the security, at the time the Rule 10b-18 purchase is effected; and

   iii. for all other securities, Rule 10b-18 purchases must be effected at a price no higher than the highest independent bid obtained from three independent dealers.

4. **Volume of purchases.** The total volume of Rule 10b-18 purchases effected by or for the issuer and any affiliated purchasers effected on any single day must not exceed 25% of the ADTV for that security. However, once each
week, in lieu of purchasing under the 25% of ADTV limit for that day, the issuer or an affiliated purchaser of the issuer may effect one block purchase if:

i. no other Rule 10b-18 purchases are effected that day; and

ii. the block purchase is not included when calculating a security’s four-week ADTV under this section.

c. Alternative conditions. The conditions of paragraph (b) of this section shall apply in connection with Rule 10b-18 purchases effected during a trading session following the imposition of a market-wide trading suspension, except:

1. that the time of purchases condition in paragraph (b)(2) of this section shall not apply, either:

   i. from the reopening of trading until the scheduled close of trading on the day that the market-wide trading suspension is imposed; or

   ii. at the opening of trading on the next trading day until the scheduled close of trading that day, if a market-wide trading suspension was in effect at the close of trading on the preceding day; and

2. the volume of purchases condition in paragraph (b)(4) of this section is modified so that the amount of Rule 10b-18 purchases must not exceed 100% of the ADTV for that security.

d. Other purchases. No presumption shall arise that an issuer or an affiliated purchaser has violated the anti-manipulation provisions of Sections 9(a)(2) or 10(b) of the Act, or §240.10b-5 under the Act, if the Rule 10b-18 purchases of such issuer or affiliated purchaser do not meet the conditions specified in paragraph (b) or (c) of this section.
Exhibit C

Form of Board Resolutions

WHEREAS, based on the financial statements of [Company Name] (the “Corporation”) for the period ended [Date] [and a [discussion with] [certification from] the Corporation’s [Chief Financial Officer]], the Corporation has an adequate surplus available for repurchases; and

WHEREAS, the Board of Directors (the “Board”) believes that it is advisable and in the best interests of the Corporation and its stockholders to repurchase shares of the common stock of the Corporation, par value US$[___] per share (“Common Stock”) from time to time at prices below what the Board believes to be the true value of such shares.

NOW, THEREFORE, BE IT RESOLVED, that [the Chief Executive Officer and the Chief Financial Officer], and each of them, be and hereby are authorized to cause the Corporation to repurchase from time to time, on the open market or otherwise, shares of Common Stock in such quantities, at such prices, and in such manner as are authorized by [Chief Executive Officer or the Chief Financial Officer] [on or prior to ________, 20___]; provided, however, that the aggregate number of shares of Common Stock repurchased pursuant to the resolutions adopted on this date shall not exceed [_______] shares [and no shares shall be repurchased pursuant to this authority at a price in excess of US$[_____] per share];

RESOLVED FURTHER, that such repurchases shall be in accordance with the terms of Rule 10b-18 promulgated under the US Securities Exchange Act of 1934, as amended, and shall be made in accordance with applicable laws and regulations in effect from time to time;

RESOLVED FURTHER, that such repurchases shall be consummated only to the extent that they do not impair the
Corporation’s capital or its ability to pay its debts within the meaning of [Section 160 of the Delaware General Corporation Law];

RESOLVED FURTHER, that [_______________] shall be engaged as the sole broker to implement the Corporation’s repurchase plan;

RESOLVED FURTHER, that, upon any such repurchase, such shares [shall be returned to the status of authorized but unissued shares of Common Stock] [may either be returned to the status of authorized but unissued shares of Common Stock or held as treasury stock of the Corporation];

RESOLVED FURTHER, that the directors and officers of the Corporation be, and each of them hereby is, authorized and empowered in the name and on behalf of the Corporation to take, or cause to be taken, all action required by [NYSE] [NASDAQ] (the “Exchange”) in connection with the repurchases, including without limitation the preparation, execution and filing of all necessary notifications, forms and agreements with, and as required by the Exchange;

RESOLVED FURTHER, that the directors and officers of the Corporation be, and each of them hereby is, authorized and empowered in the name and on behalf of the Corporation to prepare, execute and file, or cause to be prepared, executed and filed, all reports, schedules, statements, documents and information required to be filed with the US Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder in connection with the repurchases, including without limitation reports relating to certain current events on Form 8-K and updated information in the Company’s periodic reports on Form 10-Q and 10-K; and

RESOLVED FURTHER, that the directors and officers of the Corporation be, and each of them hereby is, authorized to consult with legal counsel on these matters and do and perform all other such acts.
and things and to execute and deliver all such instruments and
documents as such directors and officers may deem necessary or
appropriate to effectuate the purpose of each and all of the foregoing
resolutions.
Exhibit D

Form of Press Release

[COMPANY NAME] ANNOUNCES BOARD AUTHORIZATION OF STOCK PURCHASE PROGRAM

[Month] __, 20___ — [COMPANY NAME] ([EXCHANGE]: “________”) today announced that its Board of Directors authorized a stock repurchase program under which up to ____% or ____ million shares of its outstanding common stock may be acquired in the open market over the next ___ months at the discretion of management.

The shares will be purchased from time to time at prevailing market prices, through open market or privately negotiated transactions, depending upon market conditions. Under the program, the purchases will be funded from available working capital, and the repurchased shares will be held in treasury. There is no guarantee as to the exact number of shares that will be repurchased by [Company Name], and [Company Name] may discontinue purchases at any time that management determines additional purchases are not warranted. As of [month] ____, 20___, [Company Name] had approximately ____ million shares outstanding.

[Title and name] remarked, “The Board’s approval of this program reflects our confidence in [Company Name]’s future. Repurchasing stock is one means of underscoring our commitment to enhancing stockholder value.”

ABOUT [COMPANY NAME]

[Insert description of [COMPANY]]
Exhibit E

Memorandum

TO: Affiliates of [Company Name]

FROM: [Contact at Company]

SUBJECT: Sales of [Company Name] Stock

DATE: ________________, 20____

In connection with the [Company Name]’s [Open Market Repurchase Program], it is requested that you inform me at least [two] hours before you intend to sell any shares of your stock in [Company Name] (the “Company”). I can be reached at the following work number: (___) ___-____.

Although the law does not require that the Company halt its repurchase program during an insider sale, the Company would like to exercise prudence in this matter. Therefore, we will not repurchase shares during a period when an insider is selling Company stock. I would also appreciate your calling me or having your broker call me following the execution of the sale, so that we can resume the repurchase program.

If you have any further questions regarding this matter, please do not hesitate to contact me.
Exchange Act Reporting: Overview and Selected Forms
Annual Reporting and Proxy Activities
Summary Section of Checklist for Preparing Form 10-K

(Note: This is the summary section of the more comprehensive checklist. Please contact the Baker & McKenzie attorney with whom you work or send an email to na.cs@bakermckenzie.com for the entire checklist as you prepare your annual disclosures. We update this checklist annually for your convenience.)

This checklist is not intended as a substitute for appropriate review or analysis of specific rule text nor does it contain the full text of all rules or SEC instructions contained in the rules. All information in this document is subject to change and is current only as of October 2015. This checklist is tailored primarily for calendar year-end filers.

Information with respect to smaller reporting companies and asset-backed issuers is omitted from this checklist. If your company falls within the regulations not covered by this checklist, we recommend you consult with the Baker & McKenzie attorney with whom you work for further guidance.

Filing Deadlines

The SEC filing deadlines for Form 10-K are as follows:

- **Large accelerated filers**: 60 days after the fiscal year end.
- **Accelerated filers**: 75 days after the fiscal year end.
- **Non-accelerated filers**: 90 days after the fiscal year end.

**Check your filing status.** We recommend that you carefully review Rule 12b-2, as the determination of whether and when a company may exit its current filing status must be measured precisely as mandated in the rule. Further guidance on Rule 12b-2 and the determination of filer status can be found in the SEC’s Compliance and Disclosure

Check your filing status. We recommend that you carefully review Rule 12b-2, as the determination of whether and when a company may exit its current filing status must be measured precisely as mandated in the rule. Further guidance on Rule 12b-2 and the determination of filer status can be found in the SEC’s Compliance and Disclosure

Recent Developments

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The SEC is slowly continuing its mandate to propose and adopt rules and regulations under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). In August 2015, the SEC adopted final rules to implement the CEO pay ratio disclosure requirements under Section 953(b) of the Dodd-Frank Act. The SEC’s rulemaking remains in process for certain other remaining Dodd-Frank Act governance regulatory provisions, including pay for performance, clawback policies and hedging policies, which could affect annual meeting and annual report on Form 10-K disclosures in the future. All of these matters are discussed further below.

Although we will periodically supplement this checklist to include final rules as they relate to disclosure and compliance matters affecting a company’s annual report on Form 10-K, we recommend that you periodically consult the SEC’s website for Dodd-Frank rulemaking initiatives available at http://www.sec.gov/spotlight/dodd-frank.shtml, or contact the Baker & McKenzie attorney with whom you work as you prepare your disclosures.

Please also consult our Routine Annual Meeting Proxy Statement Checklist.

Dodd-Frank Act Items to Monitor

The following is a discussion of the SEC’s outstanding rulemaking with regards to the remaining governance regulatory provisions under the Dodd-Frank Act:
Enhanced Disclosures - Executive Compensation

**Adopted CEO Pay Ratio Disclosure Rules**

As noted above, on August 5, 2015, the SEC adopted rules to implement the CEO pay ratio disclosure requirements under the Dodd-Frank Act. The final rules can be found at [http://www.sec.gov/rules/final/2015/33-9877.pdf](http://www.sec.gov/rules/final/2015/33-9877.pdf). The rules add new letter (u) to Item 402 of Regulation S-K, requiring that a company disclose (1) the median of the annual total compensation of all of its employees, excluding the CEO, (2) the annual total compensation of the CEO and (3) the ratio of the annual total compensation of the median employee to the CEO’s annual total compensation. Effective for the first fiscal year beginning on or after January 1, 2017, these new disclosures must be made in any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. Accordingly, these rules will not impact the 2016 or 2017 proxy season for calendar year companies; however, due to the potential complexity of gathering the data for calculating this disclosure, companies should use the next two years to assess their existing information systems and begin putting in place appropriate systems and controls to collect such data and begin considering how the disclosure will be presented.

**Proposed “Pay Versus Performance” Disclosure Rules**

On April 29, 2015, the SEC released proposed rules to implement the enhanced disclosure requirements for the relationship between executive compensation actually paid and the financial performance of the company (commonly known as “pay versus performance” disclosure). As proposed, the rules would require companies to include a new pay versus performance table in proxy statements and consent solicitations in which executive compensation disclosure is required pursuant to Item 402 of Regulation S-K. The proposed rules can be found at [http://www.sec.gov/rules/proposed.shtml](http://www.sec.gov/rules/proposed.shtml). The
comment period closed on July 6, 2015; however, no final rules have been issued as of the date of these materials.

**Proposed Clawback of Executive Compensation Rules**

On July 1, 2015, the SEC released proposed rules directing the national securities exchanges and associations to establish listing standards requiring issuers to adopt and comply with written policies for recovery of incentive-based compensation based upon accounting restatements over a period of three years and to disclose those recovery policies in accordance with SEC rules (commonly known as “clawback of executive compensation”). Misconduct is not required under the Dodd-Frank Act.¹ The proposed rules can be found at [http://www.sec.gov/rules/proposed/2015/33-9861.pdf](http://www.sec.gov/rules/proposed/2015/33-9861.pdf). The comment period closed September 14, 2015; as of the date of these materials, no final rules have been issued. As proposed, these disclosures would impact any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. While no action is currently required because the rules, as proposed, would have retroactive effect on awards granted before the effective date of the final rules, companies should consider revising plans and award agreements to make awards subject to clawback policies adopted pursuant to the final rules.

**Proposed Hedging Policy Disclosure Rules**

On February 9, 2015, the SEC released proposed rules to implement the hedging policy disclosure requirements under Section 955 of the Dodd-Frank Act. As proposed, the rules will require a company to disclose whether employees (including officers) and directors are permitted to or prohibited from engaging in hedging transactions

¹ Currently, Section 304 of SOX generally requires the chief executive officer and chief financial officer of an issuer to reimburse the company for bonuses, incentive or equity compensation received or profits realized on the sale of securities (with a twelve-month look-back period) when the company restates its financial results due to misconduct.
offsetting any decreases in the market value of equity securities granted by the company as compensation or held, directly or indirectly, by such employees or directors. The current proposal does not require a company to prohibit hedging transactions. However, it does require a company to disclose whether any employee or director is permitted to engage in hedging transactions. If a company permits hedging transactions, it must disclose sufficient detail to explain the scope of any permitted transactions. Likewise if a company permits certain types of hedging transactions, it must disclose the categories of transactions it permits and those it prohibits. If a company does not permit any hedging or permits all hedging, it may so state without describing categories. This disclosure will be required in a company’s proxy statement involving the election of directors once rules are adopted by the SEC.

To implement the rules, the SEC is proposing new Item 407(i) of Regulation S-K, believing that the disclosure required is primarily corporate governance related. The SEC noted potential overlap with CD&A disclosure, as Item 402(b) of Regulation S-K lists as one example of potentially material disclosure about a company’s executive compensation program “any registrant policies regarding hedging the economic risk” of ownership of the company’s securities. The Dodd-Frank requirement is broader than the CD&A provision. Accordingly, the SEC is proposing to amend Item 402(b) to add an instruction providing that a company may satisfy any CD&A obligation to disclose material policies on hedging by named executive officers by cross-referencing the Item 407(i) disclosure to the extent that the information satisfies the CD&A disclosure requirement. The comment period on the proposed rules closed on April 20, 2015; however, no final rules have been issued as of the date of these materials. Companies should review the proposed rules and consider whether any updates should be made to their current policies and consult with the Baker & McKenzie attorney with whom they work for further guidance in this area.
Reporting Obligations Relating to the Use of Conflict Minerals and Current Status of Payment Disclosure Rules for Resource Extraction Issuers

Conflict Minerals Summary

In 2012, the SEC adopted final rules relating to the use of certain listed minerals used in manufacturing many products, including high-tech products such as mobile telephones, computers, videogame consoles, digital cameras, carbide tools and jet engine components. The specific minerals (“Conflict Minerals”) consist of cassiterite, columbite-tantalite, wolframite, their “3T” derivatives (tin, tantalum and tungsten, respectively), and gold. The legislation is premised on the belief that trading in these minerals originating in the Democratic Republic of the Congo (the “DRC”) and adjoining areas (the “DRC Countries”) has financed the activities of armed groups in the region resulting in human rights violations. The new rules are intended to curb the use of Conflict Minerals originating in the DRC Countries and cut off a source of funding for the ongoing conflict.

Conflict Minerals disclosure is required to be made on a separate report called a Form SD, which is filed electronically on EDGAR. The disclosure is also required to be posted on the issuer’s website. All issuers covered by the Conflict Minerals rules must provide the required disclosure on a calendar year basis, regardless of their fiscal year end. Reports are due on or before May 31 each year. Conflict Minerals disclosure in Form SD is not covered by the CEO and CFO certifications and is not incorporated by reference into any “shelf registration” statements filed under the Securities Act of 1933, as amended (the “Securities Act”). Conflict Minerals disclosure on Form SD is deemed “filed,” not “furnished,” and is subject to liability for misstatements under Section 18 of the Securities Exchange Act of 1934, as amended (“Exchange Act”). For more information, the SEC’s adopting release is available at http://www.sec.gov/rules/final/2012/34-67716.pdf and FAQs issued in May 2013 (updated April 7, 2014) are available at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm. In certain cases, an issuer
may need to conduct an “independent private sector audit” of its supply chain and file the audit report. Our Client Alert on the topic, *SEC Conflict Minerals Reporting on the Horizon—What Public Companies Need to Know About the AICPA’s Audit Guidance*, is available at http://bakerxchange.com/rv/ff001564afbd2b75b19448e5574dadf9d87451bb.

In July 2013, the US District Court for the District of Columbia rendered its decision in the lawsuit brought by the National Association of Manufacturers, the US Chamber of Commerce and the Business Roundtable (collectively, “Plaintiffs”) challenging the Conflict Minerals rules. The District Court rejected the Plaintiffs’ arguments that the rule should be struck down as arbitrary and capricious and/or as a violation of the First Amendment and ruled in favor of the SEC. In August 2013, the Plaintiffs appealed the district court’s decision to the US Court of Appeals for the District of Columbia, and on April 14, 2014, the Court of Appeals issued its opinion in the case (http://documents.nam.org/IEA/Conflict%20Minerals%20Opinion.pdf). The Court of Appeals upheld most aspects of the rules and statute except finding that there is a violation of the First Amendment “to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have “not been found to be ‘DRC conflict free.’” SEC Guidance on these rules, including links to the partial stay of the rules and the statement issued by the Division of Corporation Finance, is available at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm, and our Client Alert, *SEC Staff Says 2014 Conflict Minerals Reporting in Effect and on Schedule, Except for Labeling Rejected by Court of Appeals*, is available at http://bakerxchange.com/rv/ff001729c2741d311dc4212c3d4fb860d39ae9ca. During the remainder of 2014 and 2015, the Court of Appeals decision remained the topic of ongoing litigation. Most recently, on August 18, 2015, after a panel rehearing requested by the SEC, the Court of Appeals confirmed its prior ruling; on October 2, 2015, the SEC and Amnesty International filed petitions seeking an *en banc* rehearing of the panel decision (available at http://dodd-frank.com/wp-
content/uploads/2015/10/SEC-Request-for-En-Banc-Rehearing.pdf and http://www.citizen.org/documents/Filed%20Petition%20for%20Rehearing%20En%20Banc.pdf). On November 9, 2015, the Court of Appeals denied the petitions for an *en banc* rehearing (available at http://www.elmsustainability.com/wp-content/uploads/2015/11/amicus.pdf). The status quo is likely to be maintained for at least the current compliance period (calendar year 2015 filing due on May 31, 2016), and it continues to be unlikely that an independent private sector audit will be required for calendar year 2015. The SEC could next decide to file a petition for a *writ of certiorari* seeking US Supreme Court review of the appellate court’s decision. The timing of any further developments is not currently known, and it is expected that litigation could continue for some time. This area should continue to be monitored, and you should consult with the Baker & McKenzie attorney with whom you work for further guidance.

**Current Status of Payment Disclosure Rules for Resource Extraction Issuers**

As a result of litigation in 2013, the resource extraction payments disclosure rules are currently no longer in effect (see further discussion below). However, on October 2, 2015, the SEC filed notice that it proposes to adopt new final rules within 270 days (approximately June 27, 2016).

In August 2012, the SEC adopted final rules for new annual disclosure requirements to implement Section 1504 of the Dodd-Frank Act, which added Section 13(q) to the Exchange Act relating to payments to governments by US and foreign public companies for the purpose of commercial development of oil, natural gas or minerals. The rules apply to “Resource Extraction Issuers,” which are US companies and foreign companies that are engaged in the “commercial development of oil, natural gas and minerals” and that are required to file an annual report with the SEC under the Exchange Act.
The rules did not provide exemptions for smaller reporting companies, for any situations where foreign law may prohibit the required disclosure, where confidentiality agreements purport to prohibit the required disclosure or where the payments may be deemed to be commercially or competitively sensitive information. The rules required Resource Extraction Issuers to disclose certain payments made (either directly by the respective issuer or through its subsidiary or other controlled entity), during the fiscal year covered by the report, to a foreign government or the US federal government for the purpose of the commercial development of oil, natural gas, or minerals. Such disclosures were to be made on Form SD as well and filed electronically on EDGAR. The rules required disclosure of resource extraction payments to be made on a fiscal year basis. For more information, the SEC’s adopting release is available at http://www.sec.gov/rules/final/2012/34-67717.pdf and FAQs issued in May 2013 are available at http://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm.

The first Form SD to disclose resource extraction payments was to be filed no later than 150 calendar days after the end of the issuer’s fiscal year for fiscal years ending after September 30, 2013. However, on July 2, 2013, the US District Court for the District of Columbia vacated the resource extraction payment disclosure rules (American Petroleum Institute, et al. v. Securities and Exchange Commission and Oxfam America, Inc., Civil Action No. 12-1668). In its decision, the district court remanded the rulemaking to the SEC for further proceedings. As a result of the decision, the resource extraction payments disclosure rules are currently no longer in effect. In September 2013, the SEC decided not to appeal the district court’s decision. On September 2, 2015, the United States District Court for the District of Massachusetts ordered the SEC to file an expedited schedule for promulgating final resource extraction payment disclosure rules (see http://www.oxfamamerica.org/static/media/files/CASPER_DECISION.pdf). On October 2, 2015, the SEC filed notice that it proposes to adopt new final rules within 270 days (approximately June 27, 2016); see http://dodd-frank.com/wp-content/uploads/2015/10/SEC-Implementation-of-Resource-
Companies that may be affected by these rules should continue to monitor the SEC’s rulemaking initiatives in this area for further developments and consult with the Baker & McKenzie attorney with whom they work for further guidance.

Appendix E to our checklist also contains further information on these rules.

**SEC’s Disclosure Reform Project**

In December 2013, the SEC issued a staff report to Congress on its disclosure rules for US public companies as part of the SEC’s ongoing efforts to modernize and simplify disclosure requirements. In connection with this report, Chair Mary Jo White stated that, as a next step, she has directed the staff to develop specific recommendations for updating the rules that dictate what a company must disclose in its filings. As part of this project, the SEC will seek input from companies about how the SEC can make its disclosure rules work better and will solicit the views of investors about what type of information they want and how it can be best presented. The press release announcing this project can be found at [http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540530982](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540530982). See also the speech given by Chair White, *The Path Forward on Disclosure*, available at [http://www.sec.gov/News/Speech/Detail/Speech/1370539878806](http://www.sec.gov/News/Speech/Detail/Speech/1370539878806), the speech given in October 2014 by the Director of Corporation Finance, Keith Higgins, available at [http://www.sec.gov/News/Speech/Detail/Speech/1370541320533](http://www.sec.gov/News/Speech/Detail/Speech/1370541320533) and the speech given in February 2015 on Effective Disclosure for the 21st Century Investor available at [http://www.sec.gov/news/speech/022015-spchraf.html](http://www.sec.gov/news/speech/022015-spchraf.html). Companies should review their disclosures and endeavor to make them more effective by focusing on material information for investors, reducing redundancies and eliminating outdated information. Please consult with the Baker & McKenzie attorney with whom you work for further information.
SEC Staff Issues Observations on XBRL Tagging

In July 2014, staff in the Commission’s Division of Economic and Risk Analysis assessed the quality of XBRL exhibits submitted by issuers complying with the 2009 rule requirements to file financial statement information in an XBRL format and issued their observations which can be found at http://www.sec.gov/dera/reportspubs/assessment-custom-tag-rates-xbrl.html. Additionally, the Division of Corporation Finance released a sample letter (http://www.sec.gov/divisions/corpfin/guidance/xbrl-calculation-0714.htm) that was sent to public companies regarding the XBRL requirement to include calculation relationships. See Appendix F to our checklist for further information.

SEC Commentary on Audit Committee Disclosures

In a May 2014 speech, SEC Chair Mary Jo White noted that investors have expressed significant interest in increased transparency into audit committee activities. Chair White noted that she has asked the SEC staff to consider whether audit committee reporting requirements can be improved to make the reports more useful to investors. An increasing number of companies have been providing non-required disclosures in their proxy statements (more specifically in the Audit Committee Report) about their audit committees and audit committee oversight practices (for e.g., increased transparency about external auditor oversight practices). Furthermore, in response to continued interest in this area by investors, on July 1, 2015, the SEC published a concept release seeking public comment on current audit committee disclosure requirements, focusing on the committee’s oversight of the independent registered public accounting firm. The comment period closed on September 8, 2015. Comments received can be found at http://www.sec.gov/comments/s7-13-15/s71315.shtml. Developments in this area are noteworthy given the increased focus on audit committee disclosures in recent proxy seasons. Companies should continue to monitor this area for developments. Please consult with the Baker & McKenzie attorney with whom you work for further guidance in this area.
Developments at the Public Company Accounting Oversight Board (PCAOB)

On July 1, 2015, the PCAOB issued a concept release seeking public comment on the content and possible uses of a group of potential “audit quality indicators.” The new indicators are a potential portfolio of quantitative measures that may provide new insights about how to evaluate the quality of audits and how high quality audits are achieved. Taken together with qualitative context, the indicators may inform discussions among those concerned with the financial reporting and auditing process, for example among audit committees and audit firms. The comment period on the release closed on September 29, 2015. The PCAOB also plans to convene a public roundtable to discuss this concept release during the fourth quarter of 2015. The concept release can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket041.aspx. Because this could impact communications between the audit committee and the auditors, we recommend that companies continue to monitor developments in this area.

On June 30, 2015, the PCAOB issued a supplemental request for comment on previous amendments it had proposed to its auditing standards to require public company and broker-dealer audit reports to include the name of the engagement partner who led the audit, along with certain other information about participants in the audit. The supplemental request indicated that the PCAOB is considering an alternative to disclosure of this information in the auditor’s report, whereby the information would be required to be disclosed on a new PCAOB form. The supplemental request for comment closed August 31, 2015. More on these proposals can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029.aspx.

In 2014, the PCAOB adopted, and the SEC approved, Auditing Standard No. 18 (“AS18”), Related Parties, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. Directed at auditors, the new and amended
auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions, and (3) a company’s financial relationships and transactions with its executive officers. The standards also expand the required communications that an auditor must make to the audit committee related to these three areas, including communications of the auditor’s evaluation of the company’s relationships with related parties, further discussion between the auditor and committee regarding the business purpose of the company’s significant unusual transactions, discussion regarding any related party transactions discovered by the auditor that were not disclosed by management, and additional discussion concerning the company’s financial relationships and transactions with its executive officers. They also amend the standard governing representations that the auditor is required to periodically obtain from management. AS18 supersedes interim auditing standard AU sec. 334, Related Parties. AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within these fiscal years. For more on this and a summary of AS18, see http://pcaobus.org/Rules/Rulemaking/Pages/Docket038.aspx and http://www.sec.gov/rules/pcaob/2014/34-73396.pdf. Additionally of note, under the new standards, auditors are expected to communicate with audit committees about executive compensation arrangements, and companies should consider whether the compensation committee should also be a part of those discussions. Because AS18 affects the communications between the audit committee and the auditors, we recommend that audit committees discuss the communication requirements and responsibilities together with the auditors. In the wake of AS18, a number of independent registered public accounting firms have revised their audit procedures to request that the company provide a list of all related parties, as defined in Accounting Standards Codification (ASC) 850, and their affiliated entities. We recommend that companies review their D&O Questionnaires to ensure that sufficient disclosure is made to identify all related parties and related party transactions as defined by ASC 850.
On August 13, 2013, the PCAOB released two new proposed auditing standards: (1) *The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, which would supersede portions of AU sec. 508, *Reports on Audited Financial Statements*, and (2) *The Auditor’s Responsibilities Regarding Other Information in Certain Documents Containing Audited Financial Statements and the Related Auditor’s Report*, which would supersede AU sec. 550, *Other Information in Documents Containing Audited Financial Statements*. If adopted, the new auditing standards would significantly change the audit report model and dramatically expand the auditor’s responsibilities in reporting on management’s disclosures outside the financial statements. Expanding auditor reports to include company-specific information, such as the auditor’s views on significant audit issues, would change fundamentally the role of the auditor and the relationship between companies and their auditors. This is an issue that should be on the audit committee’s radar. The comment period on the proposed rules closed in December 2013; the PCAOB held a public meeting in April 2014 to obtain further input on the proposed rules. The proposed auditing standards can be found at [http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx](http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx). The PCAOB’s standard-setting agenda dated September 30, 2015 (discussed below) notes that, “[t]he staff anticipates recommending that the Board issue a reproposal of the auditor’s reporting standard for public comment in the first quarter of 2016. The staff is continuing to evaluate the proposed other information standard in light of comments received and anticipates making a recommendation for next steps to the Board at a later date.”

On September 30, 2015, the Office of the Chief Auditor of the PCAOB released its updated standard-setting agenda (available at [http://pcaobus.org/Standards/Pages/default.aspx](http://pcaobus.org/Standards/Pages/default.aspx)). Among other things, the agenda states that the PCAOB staff: (1) plans to repropose auditing standards and related amendments on the auditor’s report and the auditor’s responsibilities regarding other information; (2) plans to adopt rules to improve the transparency of audits by requiring disclosure of the engagement partner and certain other participants in
audits, with the information to be disclosed on a new PCAOB form (versus directly in the audit report as previously proposed); and (3) continues developing a proposal for a standard on auditing accounting estimates, including fair value measurements and related disclosures.

2013 COSO Framework

In May 2013, the Committee of Sponsoring Organizations of the Treadway Commission (COSO) released its updated Internal Control - Integrated Framework (“2013 Framework”). The 2013 Framework takes into account changes in the business environment and operations over the last 20 years. Commentary has indicated that SEC staff members have said that they continue to defer to COSO’s own remarks that the 1992 Framework is superseded by the 2013 Framework after December 15, 2014. Issuers should no longer be using the 1992 Framework. See Appendix C to our checklist for further discussion.

Reporting Reminders

Disclosure Requirements Relating to the Iran Threat Reduction and Syria Human Rights Act

The Iran Threat Reduction and Syria Human Rights Act of 2012 (“ITRA”) represents a significant expansion of US sanctions targeting Iran because, among other things, it (i) subjects non-US entities owned or controlled by US entities to the Iranian Transactions Regulations and makes US parent companies liable for any violations, (ii) requires publicly traded companies engaging in certain types of Iran-related business to publicly disclose such business to the SEC, and (iii) significantly expands the petroleum-related sanctions in the Iran Sanctions Act.

Of particular importance, the ITRA requires companies subject to the reporting requirements of Section 13(a) of the Exchange Act to publicly disclose specific information about relevant Iran-related
activities in annual and quarterly reports filed with the SEC for reports due on or after February 6, 2013.

The SEC provided guidance to issuers in its CDIs available at http://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm#147. The CDIs confirm that negative disclosure is not required. For more information, please consult with the Baker & McKenzie attorney with whom you work.

Non-Accelerated Filers Exempt From 404 Auditor Reports

As a reminder, the Dodd-Frank Act amended the Sarbanes-Oxley Act of 2002 ("SOX") by removing the requirement for non-accelerated filers to include an attestation report of the filer’s registered public accounting firm on internal controls with its annual report for fiscal years ending on or after June 30, 2010. On September 15, 2010, the SEC implemented conforming changes to its rules to reflect the amendment. The Dodd-Frank Act did not change the existing requirements for large accelerated filers and accelerated filers. All filers continue to be subject to Section 404(a) of SOX requiring an issuer to include a report of management on the issuer’s internal control over financial reporting. For additional information, the SEC’s final rule release is available at: http://www.sec.gov/rules/final/2010/33-9142.pdf.

Cybersecurity Risks and Cyber Incidents

In recent years, a significant number of high profile data breaches and cyber incidents have been reported by military contractors, chemical and energy companies, technology companies and other public companies. As a result, public companies are considering how cybersecurity risks, cyber incidents and the related impact of these issues on their operations should be disclosed in filings made with the SEC. Cyber incidents or attacks, which have increased in number and scope in recent years, include gaining unauthorized access to digital
systems for purposes of misappropriating assets or sensitive information, corrupting data, or causing operational disruption.

Given the increased importance of this issue, the SEC’s Division of Corporation Finance issued interpretive guidance in 2011 to assist registrants in assessing their disclosure obligations concerning cybersecurity risks and cyber incidents in registration statements and periodic reports. In its guidance, prepared in a manner consistent with the relevant disclosure considerations that arise in connection with any business risk, the SEC acknowledged that there are no existing disclosure requirements under the federal securities laws that specifically refer to cybersecurity risks or cyber incidents. However, the Division reminded registrants of certain general disclosure requirements that may impose an obligation on companies to disclose this information, such as: (1) Risk Factors; (2) Management’s Discussion and Analysis; (3) Description of Business and Legal Proceedings; and (4) Financial Statement Disclosures. The SEC’s guidance is available on its website at http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm. For more information, see our Client Alert summarizing the SEC guidance available at http://www.bakermckenzie.com/ALNACybersecurityOct11/.

The SEC has also issued comments to certain companies with regards to cybersecurity disclosures. In particular, the SEC has focused on cybersecurity incidents reported in past disclosures and/or news articles. Based on the context and types of disclosures, the SEC has asked registrants to: (1) confirm that such incidents are not material to the registrant’s business or results of operations so that investors are able to evaluate the risks; (2) expand on risk factor disclosure by describing the types of cybersecurity threats and attacks that were of most concern to the registrant and to discuss related consequences; or (3) discuss whether such threats or attacks were appropriately mitigated. In addition, where a registrant’s disclosure contained technological risk, such as potential issues with hardware or software, the SEC has asked whether such registrants have experienced any breaches, hacker attacks, unauthorized access, computer viruses and
other cybersecurity risks and, if so, whether such registrants have considered risk factor disclosure about such incidents.

The SEC convened a roundtable in March 2014 to discuss the issues and challenges cybersecurity presents for market participants and public companies, and in April 2014, the SEC’s Office of Compliance Inspections and Examinations (“OCIE”) issued a Risk Alert outlining its initiative to assess cybersecurity preparedness in the securities industry (available at http://www.sec.gov/ocie/announcement/Cybersecurity-Risk-Alert--Appendix---4.15.14.pdf) as well as an Examination Sweep Summary of its observations and findings (issued February 2015 and available at www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf). The OCIE also issued another Risk Alert in September 2015 (available at www.sec.gov/ocie/announcement/ocie-2015-cybersecurity-examination-initiative.pdf) to provide additional information on the areas of focus of its second round of cybersecurity examinations. Additionally, in a June 2014 speech (http://www.sec.gov/News/Speech/Detail/Speech/1370542057946), an SEC Commissioner cautioned that some boards may not be spending sufficient time and resources on overseeing cybersecurity risks, offering the Framework for Improving Critical Infrastructure Cybersecurity, released by the National Institute of Standards and Technology in February 2014, as one conceptual roadmap for consideration. Companies should consider the nature of any cyber incidents that occur and provide the appropriate level of disclosure about such incidents in their filings.

On December 18, 2014, the Cybersecurity Enhancement Act of 2014 (see https://www.congress.gov/bill/113th-congress/senate-bill/1353) was enacted to provide for an ongoing, voluntary public-private partnership to improve cybersecurity and to strengthen cybersecurity research and development, workforce development and education, and public awareness and preparedness. On February 13, 2015, President Obama signed an Executive Order, Promoting Private Sector Cybersecurity Information Sharing, which encourages companies to work with each other, and with the government, in a bid to deter cyber
attacks. The order builds upon efforts that began in 2013 with creating voluntary cybersecurity standards for critical infrastructure, encourages companies and industries to share information with each other, creates a common set of standards and makes it easier for companies to get classified threat information needed for protection. The Executive Order is available at https://www.whitehouse.gov/the-press-office/2015/02/13/executive-order-promoting-private-sector-cybersecurity-information-shari. No specific or affirmative SEC disclosure obligations arise from either the Cybersecurity Enhancement Act of 2014 or the Executive Order. You should continue to monitor developments in this area and consult with the Baker & McKenzie attorney with whom you work for further guidance.

Cautionary Language in Forward-Looking Statements

Section 21E of the Exchange Act requires that a registrant identify forward-looking statements and accompany those statements with meaningful cautionary language. The cautionary language should identify important factors that could cause actual results to differ materially from those in the forward-looking statement. Generally, issuers provide boiler-plate disclosure about forward-looking statements at the forepart of the annual report on Form 10-K, with a qualification and/or cross reference to the Risk Factors in Item 1A. Issuers should review and update the forward-looking statements and accompanying language as necessary to address new developments and maximize the benefit of the safe harbor in Section 21E.2

2 See Slayton v. American Express Company, 604 F.3d 758 (2d. Cir. 2010), reinforcing the need to be mindful to ensure that well-drafted forward-looking statement cautionary language accompanies forward-looking statements and providing guidance on how to better protect forward-looking statements against liability.
SEC Guidance on Presentation of Liquidity and Capital Resources Disclosures in MD&A

Item 303 of Regulation S-K requires disclosure of a company’s financial condition, changes in financial condition and results of operations. The discussion and analysis must include an identification of any known trends or any known demands, commitments, events or uncertainties that will result in (or are reasonably likely to result in) any material increase or decrease in the company’s liquidity. Similarly, the company must disclose any known material trends, favorable or unfavorable, in its capital resources and must describe any unusual or infrequent events or transactions or significant economic changes that materially affected the amount of reported income.

Specifically, this discussion must focus on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. As a reminder, a key theme in the SEC’s 1989 interpretive MD&A release, which was addressed again in the SEC’s 2003 guidance, was to encourage management to consider all relevant information in making disclosure decisions regarding known trends, events, demands, commitments and uncertainties that will result in or are reasonably likely to have a material effect on liquidity, even if the information is not otherwise disclosable.

In 2010, the SEC issued guidance on the presentation of liquidity and capital resources disclosures in the management’s discussion and analysis intended to facilitate the understanding by investors of the liquidity and funding risks facing the registrant. Among other matters, this release:

- encourages additional narrative disclosure in the context of liquidity and capital resources if the issuer’s financial statements do not adequately convey its financing arrangements during the period, such as disclosure of the financial covenants and the ratios
as of a recent date as well as disclosure of the actual interest rate for the period under such financing arrangements;

- reminds issuers that the absence of specific references in existing disclosure requirements for off-balance sheet arrangements or contractual obligations to repurchase transactions that are accounted for as sales, or to any other transfers of financial assets that are accounted for as sales, does not relieve the registrants from the disclosure requirements of Item 303(a)(1);

- encourages issuers to consider describing cash management and risk management policies that are relevant to an assessment of their financial condition;

- provides guidance about leverage ratio disclosures; and

- provides guidance about disclosures in the contractual obligations table.


Additionally, SEC staff comments in this area frequently request more meaningful analysis of the registrant’s material cash requirements, historic sources and uses of cash and material trends and uncertainties so that investors can understand the registrant’s ability to generate cash and meet cash requirements.

In preparing current disclosures, companies should also consider the expected impact of the current economic environment and ongoing turmoil in the financial markets.
NYSE

Companies should monitor and carefully review the annual letter that the NYSE customarily sends and posts in January that summarizes both the NYSE requirements for proxy statements and annual reports and cumulative changes in listing standards. We also recommend that companies consult new updates on the NYSE’s Corporate Governance page at https://www.nyse.com/regulation/nyse/issuer-oversight.

NASDAQ

We recommend that companies monitor correspondence received from NASDAQ concerning proxy materials and annual reports and also consult the NASDAQ issuer alerts available at http://NASDAQ.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F1&manual=%2FNASDAQ%2Falerts%2FNASDAQ%2DDissalerts%2F.
Summary Section of Routine Annual Meeting Proxy Statement Checklist

(Note: This is the summary section of the more comprehensive checklist. Please contact the Baker & McKenzie attorney with whom you work or send an email to na.cs@bakermckenzie.com for the entire checklist as you prepare for your annual meeting. We update this checklist annually for your convenience.)

This checklist is intended only for annual meeting proxy solicitations by company management (without opposing proxy solicitations) of US companies with common stock listed on the NYSE or NASDAQ. This checklist is not intended as a substitute for appropriate review or analysis of specific rule text nor does it contain the full text of all rules or SEC instructions contained in the rules. These materials are intended to be used in conjunction with our separate Checklist for Preparing Form 10-K. All information in this document is subject to change and is current only as of October 2015.

Information with respect to smaller reporting companies and asset-backed issuers is omitted from this checklist. If your company falls within the regulations not covered by this checklist, we recommend you consult with the Baker & McKenzie attorney with whom you work for further guidance.
Recent Developments

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The SEC is slowly continuing its mandate to propose and adopt rules and regulations under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). In August 2015, the SEC adopted final rules to implement the CEO pay ratio disclosure requirements under Section 953(b) of the Dodd-Frank Act. The SEC’s rulemaking remains in process for certain other remaining Dodd-Frank Act governance regulatory provisions, including pay for performance, clawback policies and hedging policies, which could affect annual meeting and annual report on Form 10-K disclosures in the future. All of these matters are discussed further below.

Although we will periodically supplement this checklist to include final rules as they relate to disclosure and compliance matters affecting a company’s annual meeting proxy statement, we recommend that you periodically consult the SEC’s website for Dodd-Frank rulemaking initiatives available at http://www.sec.gov/spotlight/dodd-frank.shtml, or contact the Baker & McKenzie attorney with whom you work as you prepare your disclosures.

Dodd-Frank Act Items to Monitor

The following is a discussion of the SEC’s outstanding rulemaking with regards to the remaining governance regulatory provisions under the Dodd-Frank Act:

Enhanced Disclosures - Executive Compensation

Adopted CEO Pay Ratio Disclosure Rules

As noted above, on August 5, 2015, the SEC adopted rules to implement the CEO pay ratio disclosure requirements under the Dodd-Frank Act. The final rules can be found at http://www.sec.gov/rules/final/2015/33-9877.pdf. The rules add new
letter (u) to Item 402 of Regulation S-K, requiring that a company disclose (1) the median of the annual total compensation of all of its employees, excluding the CEO, (2) the annual total compensation of the CEO and (3) the ratio of the annual total compensation of the median employee to the CEO’s annual total compensation. Effective for the first fiscal year beginning on or after January 1, 2017, these new disclosures must be made in any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. Accordingly, these rules will not impact the 2016 or 2017 proxy season for calendar year companies; however, due to the potential complexity of gathering the data for calculating this disclosure, companies should use the next two years to assess their existing information systems and begin putting in place appropriate systems and controls to collect such data and begin considering how the disclosure will be presented.

**Proposed “Pay Versus Performance” Disclosure Rules**

On April 29, 2015, the SEC released proposed rules to implement the enhanced disclosure requirements for the relationship between executive compensation actually paid and the financial performance of the company (commonly known as “pay versus performance” disclosure). As proposed, the rules would require companies to include a new pay versus performance table in proxy statements and consent solicitations in which executive compensation disclosure is required pursuant to Item 402 of Regulation S-K. The proposed rules can be found at [http://www.sec.gov/rules/proposed.shtml](http://www.sec.gov/rules/proposed.shtml). The comment period closed on July 6, 2015; however, no final rules have been issued as of the date of these materials.

**Proposed Clawback of Executive Compensation Rules**

On July 1, 2015, the SEC released proposed rules directing the national securities exchanges and associations to establish listing standards requiring issuers to adopt and comply with written policies for recovery of incentive-based compensation based upon accounting
restatements over a period of three years and to disclose those recovery policies in accordance with SEC rules (commonly known as “clawback of executive compensation”). Misconduct is not required under the Dodd-Frank Act.\footnote{Currently, Section 304 of SOX generally requires the chief executive officer and chief financial officer of an issuer to reimburse the company for bonuses, incentive or equity compensation received or profits realized on the sale of securities (with a twelve-month look-back period) when the company restates its financial results due to misconduct.} The proposed rules can be found at http://www.sec.gov/rules/proposed/2015/33-9861.pdf. The comment period closed September 14, 2015; as of the date of these materials, no final rules have been issued. As proposed, these disclosures would impact any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K. While no action is currently required because the rules, as proposed, would have retroactive effect on awards granted before the effective date of the final rules, companies should consider revising plans and award agreements to make awards subject to clawback policies to be adopted pursuant to the final rules.

**Proposed Hedging Policy Disclosure Rules**

On February 9, 2015, the SEC released proposed rules to implement the hedging policy disclosure requirements under Section 955 of the Dodd-Frank Act. As proposed, the rules will require a company to disclose whether employees (including officers) and directors are permitted to or prohibited from engaging in hedging transactions offsetting any decreases in the market value of equity securities granted by the company as compensation or held, directly or indirectly, by such employees or directors. The current proposal does not require a company to prohibit hedging transactions. However, it does require a company to disclose whether any employee or director is permitted to engage in hedging transactions. If a company permits hedging transactions, it must disclose sufficient detail to explain the scope of any permitted transactions. Likewise if a company permits certain types of hedging transactions, it must disclose the categories...
of transactions it permits and those it prohibits. If a company does not permit any hedging or permits all hedging, it may so state without describing categories. This disclosure will be required in a company’s proxy statement involving the election of directors once rules are adopted by the SEC.

To implement the rules, the SEC is proposing new Item 407(i) of Regulation S-K, believing that the disclosure required is primarily corporate governance related. The SEC noted potential overlap with CD&A disclosure, as Item 402(b) of Regulation S-K lists as one example of potentially material disclosure about a company’s executive compensation program “any registrant policies regarding hedging the economic risk” of ownership of the company’s securities. The Dodd-Frank requirement is broader than the CD&A provision. Accordingly, the SEC is proposing to amend Item 402(b) to add an instruction providing that a company may satisfy any CD&A obligation to disclose material policies on hedging by named executive officers by cross-referencing the Item 407(i) disclosure to the extent that the information satisfies the CD&A disclosure requirement. The comment period on the proposed rules closed on April 20, 2015; however, no final rules have been issued as of the date of these materials. Companies should review the proposed rules and consider whether any updates should be made to their current policies and consult with the Baker & McKenzie attorney with whom they work for further guidance in this area.

SEC Guidance on Proxy Advisory Services

In June 2014, the SEC released Staff Legal Bulletin No. 20, Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms (“SLB 20”) (available at http://www.sec.gov/interps/legal/cfslb20.htm). In SLB 20, the staff provided guidance on the proxy voting responsibilities of investment advisers, the use of proxy advisory firms and the applicability of the proxy rules to such firms. Please consult with the Baker & McKenzie attorney with whom you work for further guidance in this area.
SEC Commentary on Audit Committee Disclosures

In a May 2014 speech, SEC Chair Mary Jo White noted that investors have expressed significant interest in increased transparency into audit committee activities. Chair White noted that she has asked the SEC staff to consider whether audit committee reporting requirements can be improved to make the reports more useful to investors. An increasing number of companies have been providing non-required disclosures in their proxy statements (more specifically in the Audit Committee Report) about their audit committees and audit committee oversight practices (for e.g., increased transparency about external auditor oversight practices). Furthermore, in response to continued interest in this area by investors, on July 1, 2015, the SEC published a concept release seeking public comment on current audit committee disclosure requirements, focusing on the committee’s oversight of the independent registered public accounting firm. The comment period closed on September 8, 2015. Comments received can be found at http://www.sec.gov/comments/s7-13-15/s71315.shtml. Developments in this area are noteworthy given the increased focus on audit committee disclosures in recent proxy seasons. Companies should continue to monitor this area for developments. Please consult with the Baker & McKenzie attorney with whom you work for further guidance in this area.

SEC’s Disclosure Reform Project

In December 2013, the SEC issued a staff report to Congress on its disclosure rules for US public companies as part of the SEC’s ongoing efforts to modernize and simplify disclosure requirements. In connection with this report, Chair Mary Jo White stated that as a next step, she has directed the staff to develop specific recommendations for updating the rules that dictate what a company must disclose in its filings. As part of this project, the SEC will seek input from companies about how the SEC can make its disclosure rules work better and will solicit the views of investors about what type of information they want and how it can be best presented. The press release announcing this project can be found at

**Delaware Corporate Law**

*Equity Incentive Plans*

Of note concerning director compensation is the 2015 Delaware Court of Chancery holding in *Calma v. Templeton*, C.A. No. 9579-CB (Del. Ch. April 30, 2015). The case involved a challenge to equity awards made to non-employee directors under a stockholder approved plan. Up until this case, Delaware courts had historically reviewed these cases under the business judgment rule. In *Calma*, the Court held that the stockholder ratification defense the directors were asserting, which allowed directors to avoid the entire fairness standard of review and maintain the presumptions of the deferential business judgment rule, applied to a review of compensation grants only when the company’s underlying compensation plan approved by stockholders specifies the amount or form of compensation to be issued to a company’s non-employee directors. The court ruled that because the plan included no “meaningful limit” on the number of awards that could be made to a single director, stockholder approval of the plan did not amount to ratification and therefore the awards should be evaluated under the entire fairness standard, thereby making it easier for plaintiffs to bring suits over director compensation. In light of this decision, companies may wish to be proactive in reviewing existing director compensation.
arrangements in order to reduce the risk of these types of lawsuits. Please consult with the Baker & McKenzie attorney with whom you work with for further guidance.

**Director Independence**

On October 2, 2015, the Delaware Supreme Court held in *Del. Cnty. Emp. Ret. Fund, et al. v. Sanchez, et al.*, 2015 WL 5766264 (Del. Oct. 2, 2015) that a director’s personal and business relationships with an interested party must be reviewed in their totality when considering a director’s independence, and that a long-term friendship carries a greater inference of compromise of independence than do more superficial relationships. Although the tests for independence under Delaware law as compared to those under the NYSE and NASDAQ listing standards serve different purposes and reflect the common law versus quasi-legislative nature of their respective purveyors, companies may still want to consider this case as they are making their annual independence assessments and consider additional areas of inquiry in D&O Questionnaires.

**Important Reminders**

**Disclosure Requirements for Periodic Reports: Iran Threat Reduction and Syria Human Rights Act**

The Iran Threat Reduction and Syria Human Rights Act of 2012 (“ITRA”) represents a significant expansion of US sanctions targeting Iran because, among other things, it (i) subjects non-US entities owned or controlled by US entities to the Iranian Transactions Regulations and makes US parent companies liable for any violations, (ii) requires publicly traded companies engaging in certain types of Iran-related business to publicly disclose such business to the SEC and (iii) significantly expands the petroleum-related sanctions in the Iran Sanctions Act.

Of particular importance, the ITRA requires companies subject to the reporting requirements of Section 13(a) of the Exchange Act to publicly disclose specific information about relevant Iran-related
activities in annual and quarterly reports filed with the SEC for reports due on or after February 6, 2013. The SEC provided guidance to issuers in its CDIs available at http://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm#147. The CDIs confirm that negative disclosure is not required.

Because directors and certain executive officers may be deemed affiliates under the ITRA, we have included information about certain activities that may impose reporting requirements by the company in our Annual Meeting Calendar of Actions and Responsibilities and in our forms of Non-Employee Director and Executive Officer Questionnaires. For additional information, please consult with the Baker & McKenzie attorney with whom you work.

Proxy Advisory Firm Updates and Policies of Other Institutional Investors

On October 26, 2015, Institutional Shareholder Services (“ISS”), one of the leading proxy advisory firms in the US, announced the launch of its 2016 benchmark voting policy consultation period (http://www.issgovernance.com/institutional-shareholder-services-launches-2016-benchmark-policy-consultation/). Three areas ISS is considering changing its US voting policies are: (1) lowering the acceptable number of board positions when considering director “overboarding,” (2) extending the period of time it recommends voting “against” directors when a board unilaterally adopts bylaw/charter amendments that “materially diminish shareholder rights,” and (3) for an externally-managed issuer (EMI) (for e.g., a REIT), recommending a vote “against” the say-on-pay proposal, or in the absence of a say-on-pay proposal, the compensation committee members or chair or the entire board, as appropriate, if the EMI does not provide sufficient disclosure on the compensation arrangements and payments made to its executives by the external manager for ISS to perform a comprehensive pay-for-performance analysis. The comment period on the proposed changes closed November 9, 2015, and ISS expects to release its final policy updates for the upcoming 2016 proxy season on November 18, 2015; see website at
It is important for public companies to be aware of and understand ISS’ voting guidelines and policies and to ensure that current practices within the company adhere to the ISS standards to avoid receiving negative voting recommendations. Additionally, Glass Lewis Policy Guidelines can be found at http://www.glasslewis.com/resource/guidelines/. In 2015Glass Lewis announced enhancements to the performance metrics used in its US pay-for-performance (P4P) model, as well as its US equity plan model. These changes became effective February 2, 2015.

In August 2015, ISS launched its annual global policy survey. Each year, ISS solicits comments in connection with its review of its proxy voting policies. The survey results, including a summary of key findings, is available at http://www.issgovernance.com/iss-releases-results-of-annual-global-voting-policy-survey/. As a reminder, for reviewing and evaluating equity incentive plans, beginning with the 2015 proxy season, ISS adopted a “scorecard” model (Equity Plan Scorecard) which considers a range of positive and negative factors rather than a series of pass or fail tests. Also, in August 2014, ISS announced (http://www.issgovernance.com/equity-plan-data-verification) the launch of a new data verification portal covering information on equity-based compensation plans that US companies submit for approval by their shareholders. The goal of the portal is to ensure that ISS’ proxy analyses will better reflect the latest and most accurate data for each company receiving a proxy recommendation. Under the new process, all US companies that file their proxy statements with the SEC seeking shareholder approval of an equity plan can utilize the new platform to verify key data points underlying ISS’ evaluation of the plan. ISS is encouraging affected companies to register to receive notification of the availability of their data. Upon notification by ISS, companies will have two business days to verify the data and/or request modifications. ISS will make the data available from 9:00 am ET on the first business day after it collects the company’s/plan’s data and publishes it to the portal, until 9:00 pm ET on the second business day. The portal also includes a Frequently
Asked Questions section that provides more information on the data verification process.

Companies should also review and consider the proxy voting policies of their larger institutional stockholders, which are usually published and available on their websites.

**Say-on-Pay**

Publicly traded companies, including smaller reporting companies, must conduct a say-on-pay vote to provide shareholders with an advisory vote on executive compensation and a say-on-when vote to determine the frequency of the say-on-pay vote under the Dodd-Frank Act. The say-on-pay vote must be held at least once every three years and the say-on-when vote, once every six years.

In the proxy statement following a say-on-pay vote, Item 402(b) of Regulation S-K requires the company to disclose in its CD&A whether, and if so, how it has considered the results of the most recent say-on-pay vote in determining compensation policies and decisions, and if so, how that consideration has affected its executive compensation policies and decisions. To the extent material to its compensation policies and decisions disclosed, the company should also address its consideration of the results of earlier say-on-pay votes.

Companies may also wish to consider the following, regardless of whether a say-on-pay vote will be held every 1, 2 or 3 years:

- Engage in a dialogue with shareholders and proxy advisory firms, particularly if large institutional shareholders did not approve compensation in the prior year. Understanding investors concerns and being accountable to shareholders are key tools to effectively deal with the requirements of mandatory say-on-pay.

- Review recent situations where companies failed to receive majority shareholder support and consider reasons why that was the case.
• Provide an executive summary at the outset of your CD&A that discusses key provisions of your company’s compensation arrangements and clearly demonstrates the relationship between pay and performance.

• Review your CD&A and explain the philosophy behind all compensation. It is important to explain to the shareholders what you are paying to whom and why. Review your disclosure to ensure it provides specific information regarding the rationale for all compensation being paid, including differences in compensation paid to named executive officers versus other employees.

• Consider including quantitative, graphical or similar information in the CD&A comparing your executive compensation trends against specific corporate or share performance. A number of companies have voluntarily added this type of information in an effort to demonstrate that executive compensation trends favorably compare to relevant measures of corporate financial and/or share performance, which may assist in receiving a favorable vote on the say-on-pay proposals.

• Review the current compensation arrangements to ensure that they correlate with stated objectives, including pay for performance that your board intends to be incentivized. Review how the company defines financial performance for purposes of compensation decisions and the rationale for selecting specific performance measures. Review last year’s CD&A and tabular compensation discussion to ensure clarity and sound justifications for all compensation decisions.

• Review proxy advisory firms’ policies and voting guidelines, such as those released by ISS and Glass Lewis against your company’s compensation proposals to determine how such proposals will be viewed (and voted on) by institutional shareholders. You should be aware of how your policies compare against those recommended by such firms and consider whether certain changes
make sense. As noted above, ISS releases its policy updates typically in November.

Furthermore, public companies have had to consider, and should continue to consider, the various types of say-on-pay/executive compensation lawsuits that have been evolving over the past several years when drafting their annual proxy statement disclosures. Thus far, the lawsuits have challenged the adequacy of disclosures on executive compensation in connection with say-on-pay votes mandated by the Dodd-Frank Act, as well as alleging executive compensation grants in violation of stock incentive plans and in violation of Section 162(m) of the Internal Revenue Code. See more on Section 162(m) disclosures in our Schedule 14A and Proxy Rules Checklist. Additionally, see the discussion above under “Delaware Corporate Law—Equity Incentive Plans” regarding recent director compensation lawsuits. A well-drafted proxy statement can help minimize the risk of such litigation, and accordingly, we recommend that you review the company’s compensation disclosures with the Baker & McKenzie attorney with whom you work. Compensation decisions should also be made with care and documented and recorded appropriately in board and compensation committee minutes.

Additionally, if your company received a low level of support in the previous management say-on-pay proposal, we recommend you also review the company’s compensation programs and disclosure with the Baker & McKenzie attorney with whom you work.

Shareholder Proposals

Proxy Access

In August 2010, the SEC voted to adopt federal proxy access rules. The rules, originally expected to be effective in November 2010, were voluntarily stayed by the SEC pending the outcome of litigation challenging the SEC’s mandatory proxy access rule, Exchange Act Rule 14a-11, filed by the Business Roundtable and the US Chamber of Commerce. On July 22, 2011, the US Court of Appeals for the DC
Circuit rejected and vacated Rule 14a-11 claiming the SEC was “arbitrary and capricious” in adopting the rule, among other matters.

As a reminder, under amended Exchange Act Rule 14a-8(i)(8), shareholders may submit proposals that seek to establish a procedure in the company’s governing documents for the inclusion of one or more shareholder director nominees in a company’s proxy materials. The proposals may be in the form of a bylaw amendment or a request to amend the company’s governing documents for this purpose. A company must include such a shareholder proposal under the rules as long as the procedural requirements of Rule 14a-8 are met. However, a company may continue to exclude a shareholder proposal that: would disqualify a nominee standing for election or would remove a director from office before the expiration of his or her term; questions the competence, business judgment or character of a nominee or incumbent director; seeks to include a specific nominee in the company’s proxy materials; or otherwise could affect the outcome of the upcoming election of directors.

Under Rule 14a-8(i)(8), a nominating shareholder (or shareholder group) that is relying on a procedure under state or foreign law or a company’s governing documents to include a nominee in a company’s proxy materials would be required to provide disclosure concerning the nominating shareholder and nominee or nominees to the company on new Schedule 14N. This disclosure is also required in a company’s annual meeting proxy statement pursuant to Item 7 of Schedule 14A.

In the event a registrant is required to include shareholder director nominees in the registrant’s proxy materials pursuant to either an applicable state or foreign law provision, or a provision in the registrant’s governing documents, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N required pursuant to Exchange Act Rule 14a-18. Disclosure under Item 5.08(a) is triggered if a registrant did not hold an annual meeting last year, or changed the date of this year’s annual meeting by more than 30 calendar days from the date of last year’s meeting. In that case, a
registrant would be required to file a Form 8-K within four business
days after it determines the anticipated meeting date. See our Annual
Meeting Calendar of Actions and Responsibilities in this checklist.

During the 2015 proxy season, the New York City Comptroller, on
behalf of the $160 billion NYC Pension Funds, announced the launch
of a national campaign to give shareholders the ability to nominate
directors of US public companies using the company’s ballot (calling
it the “Boardroom Accountability Project”). The press release (available at http://comptroller.nyc.gov/newsroom/comptroller-
stringer-nyc-pension-funds-launch-national-campaign-to-give-
shareowners-a-true-voice-in-how-corporate-boards-are-elected/) noted
that these shareholder proposals for proxy access had been submitted
to 75 companies; the press release contains a link to a list of
companies where the proposal had been submitted as well as a link to
the form of proposal submitted.

On January 16, 2015, the SEC released two statements: (i) one from
Chair White directing the staff to review Exchange Act Rule 14a-
8(i)(9) on the exclusion of a shareholder proposal conflicting with a
management proposal, and (ii) one from the staff indicating that in
light of the direction from Chair White, they would no longer be
expressing any views on the application of Rule 14a-8(i)(9) during
the 2015 proxy season. The statements are available here. Exchange
Act Rule 14a-8(i)(9) states that one basis for a company to exclude a
shareholder proposal is if the shareholder proposal “directly conflicts
with one of the company’s own proposals to be submitted to
shareholders at the same meeting.” These announcements came after
concerns arose with respect to the proper scope and application of
Rule 14a-8(i)(9) in a number of no-action requests seeking to exclude
“proxy access” shareholder proposals. The staff had granted no-action
relief in December 2014, permitting the requesting company to
exclude a proxy access shareholder proposal from its 2015 proxy
materials because it would conflict with a company-sponsored proxy
access bylaw amendment to be voted on at the same meeting. The
SEC also issued a reconsideration letter on the prior no-action relief
granted, which is available here. Additionally, Keith Higgins gave this
speech discussing some of the issues the staff would be considering as they reviewed Rule 14a-8(i)(9).

After completing its review, on October 22, 2015, the SEC issued Staff Legal Bulletin (SLB) No. 14H (available at http://www.sec.gov/interps/legal/cfslb14h.htm), providing guidance on the scope and application of Rule 14a-8(i)(9). The SEC’s guidance provides that, “After reviewing the history of Rule 14a-8(i)(9) and based on our understanding of the rule’s intended purpose, we believe that any assessment of whether a proposal is excludable under this basis should focus on whether there is a direct conflict between the management and shareholder proposals. For this purpose, we believe that a direct conflict would exist if a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal. While this articulation may be a higher burden for some companies seeking to exclude a proposal to meet than had been the case under our previous formulation, we believe it is most consistent with the history of the rule and more appropriately focuses on whether a reasonable shareholder could vote favorably on both proposals or whether they are, in essence, mutually exclusive proposals. In considering no-action requests under Rule 14a-8(i)(9) going forward, we will focus on whether a reasonable shareholder could logically vote for both proposals.” The SLB provides examples of “directly conflicting” proposals. The new guidance is expected to lead to (i)(9) being used less frequently as an exclusion basis going forward.

As proxy access is expected to be a continuing area of focus in the 2016 proxy season, we recommend that you review and continue to monitor developments in this area, including the proxy advisory firms’ and large institutional shareholders’ policies and bylaw provisions that are being advanced/adopted in this area. Boards should be educated in advance about proxy access and potential actions that can be taken so that if a proxy access stockholder proposal is received, proactive action can be taken quickly. Advance preparation in this area can be valuable with respect to information flow and action plans. See also our form of US Public Company Bylaws for a Delaware Corporation
and please consult with the Baker & McKenzie attorney with whom you work.

**Other Corporate Governance Proposals**

Shareholders continue to focus on other governance-related proposals, including board declassification proposals, proposals calling for a majority vote standard for uncontested director elections, independent chair proposals, and proposals to give shareholders the right to act by written consent and/or the right to call a special meeting. Please consult with the Baker & McKenzie attorney with whom you work for further guidance should the company receive a shareholder proposal in any of these or other areas.

**Political Spending Policies/Disclosure**

In recent years, shareholders have continued to submit and have expanded the focus of shareholder proposals on political spending. Proposals focus on direct spending and also address indirect lobbying activities, including membership in trade organizations and grassroots lobbying. The goal of many shareholders that are active in this area is to ensure that companies provide greater transparency and accountability in their policies and activities regarding political spending. Please consult with the Baker & McKenzie attorney with whom you work for further guidance should the company receive a shareholder proposal in this area.

**SEC Staff Legal Bulletins (SLBs)**


As noted above, SLB No. 14H was released in October 2015. A discussion of the guidance provided on Rule 14a-8(i)(9) in the SLB is included above under Proxy Access. SLB No. 14H also provides
guidance on Rule 14a-8(i)(7) in light of *Trinity Wall Street v. Wal-Mart Stores, Inc.*\(^2\) Rule 14a-8(i)(7) provides for exclusion of a shareholder proposal if it deals with a matter relating to the company’s ordinary business operations. The staff’s guidance reiterates that, notwithstanding the Third Circuit’s holding in *Trinity Wall Street*, “the analysis under this rule should focus on the underlying subject matter of a proposal’s request for board or committee review regardless of how the proposal is framed...proposals that focus on a significant policy issue transcend a company’s ordinary business operations and are not excludable under Rule 14a-8(i)(7).”

**Interim Vote Tally Reports**

Due to the controversy in 2013 surrounding the availability to management of interim vote reports, during the 2014 proxy season, many companies received shareholder proposals seeking to have interim tally vote reports not made available to management and the board of directors of a company. There are currently no SEC rules or other rules governing the practice of providing voting information in advance of the meeting, including to issuers (however, see the October 2014 recommendation to the SEC from the Investor Advisory Committee at [http://www.sec.gov/spotlight/investor-advisory-committee-2012.shtml](http://www.sec.gov/spotlight/investor-advisory-committee-2012.shtml)). Interim vote reports are generally furnished to the company beginning 15 days before the meeting and show the number of votes cast in favor, against and abstentions for the proposals on the proxy card. The debate concerned perceived advantages of management knowing how shareholders were voting, while a shareholder who may solicit in opposition to the company would not have access to that information. No-action relief was sought for excluding these proposals early in the 2014 proxy season and was granted on grounds of vagueness. Thereafter, proponents attempted to revise and streamline the proposals so as to not be considered vague. No-action relief was again sought for excluding the new form of proposal later in the 2014 proxy season and was granted on the

\(^2\) 792 F.3d 323 (3d Cir. 2015).
grounds that the proposal relates to the monitoring of preliminary voting results with respect to matters that may relate to a company’s ordinary business. If the company receives one of these types of proposals, we recommend consulting with the Baker & McKenzie attorney with whom you work.


**NYSE**

Companies should monitor and carefully review the annual letter that the NYSE customarily sends and posts in January that summarizes both the NYSE requirements for proxy statements and annual reports and cumulative changes in listing standards. We also recommend that companies consult new updates on the NYSE’s Corporate Governance page at https://www.nyse.com/regulation/nyse/issuer-oversight.

*NYSE Eliminates Additional Quorum Requirement for Certain Matters Requiring Shareholder Approval*

Section 312.07 of the NYSE Listed Company Manual sets forth the voting requirements for shareholder proposals where shareholder approval is a prerequisite to the listing of any additional or new securities, such as approval of certain issuances of stock or equity compensation plans. Previously, the rule required such matters to be approved by the majority of votes cast and contained an additional quorum requirement stating that the total votes cast on the proposal must represent over 50% of the securities entitled to vote on the proposal. Effective July 11, 2013, the NYSE amended the rule to eliminate the additional quorum provision so that the rule now simply requires approval by the majority of votes cast on a proposal. Accordingly, quorum for such matters will now be determined only by reference to a company’s charter and bylaws and applicable state law.
NASDAQ

We recommend that companies monitor correspondence received from NASDAQ concerning proxy materials and annual reports and also consult the NASDAQ issuer alerts available at http://NASDAQ.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F1&manual=%2FNASDAQ%2Falerts%2FNASDAQ%2Dissalerts%2F.

Developments at the Public Company Accounting Oversight Board (PCAOB)

On July 1, 2015, the PCAOB issued a concept release seeking public comment on the content and possible uses of a group of potential “audit quality indicators.” The new indicators are a potential portfolio of quantitative measures that may provide new insights about how to evaluate the quality of audits and how high quality audits are achieved. Taken together with qualitative context, the indicators may inform discussions among those concerned with the financial reporting and auditing process, for example among audit committees and audit firms. The comment period on the release closed on September 29, 2015. The PCAOB also plans to convene a public roundtable to discuss this concept release during the fourth quarter of 2015. The concept release can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket041.aspx. Because this could impact communications between the audit committee and the auditors, we recommend that companies continue to monitor developments in this area.

On June 30, 2015, the PCAOB issued a supplemental request for comment on previous amendments it had proposed to its auditing standards to require public company and broker-dealer audit reports to include the name of the engagement partner who led the audit, along with certain other information about participants in the audit. The supplemental request indicated that the PCAOB is considering an alternative to disclosure of this information in the auditor’s report, whereby the information would be required to be disclosed on a new
In 2014, the PCAOB adopted, and the SEC approved, Auditing Standard No. 18 (“AS18”), Related Parties, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. Directed at auditors, the new and amended auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions, and (3) a company’s financial relationships and transactions with its executive officers. The standards also expand the required communications that an auditor must make to the audit committee related to these three areas, including communications of the auditor’s evaluation of the company’s relationships with related parties, further discussion between the auditor and committee regarding the business purpose of the company’s significant unusual transactions, discussion regarding any related party transactions discovered by the auditor that were not disclosed by management, and additional discussion concerning the company’s financial relationships and transactions with its executive officers. They also amend the standard governing representations that the auditor is required to periodically obtain from management. AS18 supersedes interim auditing standard AU sec. 334, Related Parties. AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within these fiscal years. For more on this and a summary of AS18, see http://pcaobus.org/Rules/Rulemaking/Pages/Docket038.aspx and http://www.sec.gov/rules/pcaob/2014/34-73396.pdf. Additionally of note, under the new standards, auditors are expected to communicate with audit committees about executive compensation arrangements, and companies should consider whether the compensation committee should also be a part of those discussions. Because AS18 affects the communications between the audit committee and the auditors, we recommend that audit...
committees discuss the communication requirements and responsibilities together with the auditors. In the wake of AS18, a number of independent registered public accounting firms have revised their audit procedures to request that the company provide a list of all related parties, as defined in Accounting Standards Codification (ASC) 850, and their affiliated entities. We recommend that companies review their D&O Questionnaires to ensure that sufficient disclosure is made to identify all related parties and related party transactions as defined by ASC 850.

On August 13, 2013, the PCAOB released two new proposed auditing standards: (1) *The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, which would supersede portions of AU sec. 508, *Reports on Audited Financial Statements*, and (2) *The Auditor’s Responsibilities Regarding Other Information in Certain Documents Containing Audited Financial Statements and the Related Auditor’s Report*, which would supersede AU sec. 550, *Other Information in Documents Containing Audited Financial Statements*. If adopted, the new auditing standards would significantly change the audit report model and dramatically expand the auditor’s responsibilities in reporting on management’s disclosures outside the financial statements. Expanding auditor reports to include company-specific information, such as the auditor’s views on significant audit issues, would change fundamentally the role of the auditor and the relationship between companies and their auditors. This is an issue that should be on the audit committee’s radar. The comment period on the proposed rules closed in December 2013; the PCAOB held a public meeting in April 2014 to obtain further input on the proposed rules. The proposed auditing standards can be found at [http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx](http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx). The PCAOB’s standard-setting agenda dated September 30, 2015 (discussed below) notes that, “[t]he staff anticipates recommending that the Board issue a reproposal of the auditor’s reporting standard for public comment in the first quarter of 2016. The staff is continuing to evaluate the proposed other information standard in light of comments received and anticipates making a recommendation for next steps to the Board at a later date.”
On September 30, 2015, the Office of the Chief Auditor of the PCAOB released its updated standard-setting agenda (available at http://pcaobus.org/Standards/Pages/default.aspx). Among other things, the agenda states that the PCAOB staff: (1) plans to repropose auditing standards and related amendments on the auditor’s report and the auditor’s responsibilities regarding other information; (2) plans to adopt rules to improve the transparency of audits by requiring disclosure of the engagement partner and certain other participants in audits, with the information to be disclosed on a new PCAOB form (versus directly in the audit report as previously proposed); and (3) continues developing a proposal for a standard on auditing accounting estimates, including fair value measurements and related disclosures.
INSTRUCTIONS FOR USE:

We have designed this questionnaire to help companies gather information from their executive officers in connection with the preparation of the annual proxy statement and Part III of the annual report on Form 10-K. We have a separate questionnaire designed for non-employee directors and nominees for non-employee director so that they can answer only questions relevant to them. This questionnaire is designed primarily for use by listed US domestic issuers that are not the types of entities that receive special treatment under the applicable SEC rules and exchange standards, such as controlled companies, smaller reporting companies and foreign private issuers. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual markets’ listing standards, which this questionnaire does not address.

Latest Developments

On June 10, 2014, the Public Company Accounting Oversight Board (PCAOB) adopted Auditing Standard No. 18 (AS 18), Related Parties, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. The SEC approved the rules on October 21, 2014. Directed at auditors, the new and amended auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions, and (3) a company’s financial relationships and transactions with its executive officers. AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within these fiscal years. Part 6 “Related Person Transactions,” along with Appendix C, is designed to assist in obtaining information about related persons and related person
transactions (as defined in Regulation S-K, Item 404 and Accounting Standards Codification (ASC) 850) and may assist with obtaining the information the auditors will now be required to review under AS 18.

The following are some suggestions for tailoring this form to your company’s use:

- **We recommend that you consult the SEC’s updated compliance and disclosure interpretations (CDIs) periodically in preparing your company’s annual disclosures with information derived from this questionnaire. The CDIs are periodically updated by the SEC and contain questions that may be germane to your disclosure. The CDIs are available at [http://www.sec.gov/divisions/corpfin/cfguidance.shtml](http://www.sec.gov/divisions/corpfin/cfguidance.shtml).**

- **Modify question 1.c depending on whether you include an officer biography to edit.**

- **Modify Part 5 and Appendix A concerning executive officer compensation in a manner that is appropriate to your fact-gathering. There is no “one size fits all” approach to this aspect since public companies’ compensation practices vary.**

- **Determine if you want to include the questions about sanctionable activities with Iran (see discussion of Iran Threat Reduction and Syria Human Rights Act of 2012 herein) and retain or remove Part 9 accordingly.**

- **Change other bracketed language and modify names, dates and commentary, including footnotes, as needed.**

Also note that this questionnaire should not be used in connection with registration statements without further review of SEC regulations. Additionally, if your company plans to rely on Regulation D for private placements, you should consider adding appropriate questions to address the new “bad actor” provisions of Rule 506; see our client alert at [http://www.bakermckenzie.com/files/Publication/](http://www.bakermckenzie.com/files/Publication/)
7601023b-8312-4a52-81a3-272afe3bc3f0/Presentation/PublicationAttachment/b091f45b-fb4b-49ed-b389-2fb40fb985a/al_na_generalsolicitationadvertising_jul13.pdf. We recommend that you consult with the Baker & McKenzie attorney with whom you work if you have any questions.

This questionnaire is current only as of October 2015. Future regulations implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 may require your company to adopt changes to this questionnaire. This form of questionnaire is for informational purposes only and may not be relied upon as legal advice.
MEMORANDUM

TO: [name of executive officer]

FROM: [sender – e.g., general counsel]

SUBJECT: Executive Officers’ Annual Questionnaire

DATE: __________ ___, 20__

I am circulating this questionnaire to our executive officers in order to collect and verify information that we will use in our Form 10-K and proxy statement that we will file with the Securities and Exchange Commission.

After you have completed this questionnaire, please sign, date and return it by _______ ___, 20__ in the enclosed envelope or email it to me at ____________. Please retain a copy of the completed questionnaire for your records.

If you need more space to answer any questions, please feel free to attach additional sheets of paper. If you have any questions about any part of this questionnaire, please contact ____________ at (___) ___-____ or __________@______.com.

Terms that appear in bold type in this questionnaire have special meanings defined in the attached Appendix B.

Terms such as “we,” “us” and “our” refer to [company name] and its subsidiaries unless the context otherwise indicates.

References to our “last full fiscal year” mean the year ended __________, 20__.

For your information in filling out this questionnaire, we [are attaching pages from prior SEC filings to assist your review] [or] [have filled in certain information below relating to meetings, stock and compensation matters based on company records.] [Please
check carefully all information that we have filled in below and make any necessary changes if this information does not appear to be correct.

Please answer each item in the questionnaire clearly, truthfully and comprehensively. The information requested is for your protection and that of our company, and will be used to assure that related information in our SEC filings is correct.
## Annual Questionnaire for Executive Officers of
[insert company name]

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¹ This section contains questions regarding compliance with the Iran Threat Reduction and Syria Human Rights Act of 2012. Given the nature of certain questions contained in this section, the company may prefer to verbally discuss these matters with executive officers rather than including them in this questionnaire. See drafting notes in Part 9 for further commentary.
1. Your Business Background

1.a How do you wish your name to appear in our SEC filings?

________________________________________________________________________

1.b What is your date of birth? _____________________

[1.c [for companies with completed biographies for such executive officer:]] Please edit, as needed, the following paragraph that must at a minimum provide information about your business experience during the last five years, including the name of employer (or self-employed), the type of business of the employer, positions you held, and the nature of your responsibilities:

[insert individual’s biography]

☐ I have no changes to make in the above biographical information.

☐ I have made changes to the above biography as indicated.

[1.c [for companies without completed biographies:]] Please provide the following information about your business experience during the last five years:

<table>
<thead>
<tr>
<th>Time Period by Month &amp; Year</th>
<th>Name of Employer*</th>
<th>Principal Business of Employer</th>
<th>Position(s) Held</th>
<th>Nature of Responsibilities</th>
</tr>
</thead>
</table>

* Also list any self-employed occupations during the past five years.
Executive Officers’ Annual Questionnaire

1.d If you now serve, or during the last five fiscal years served, or expect to be nominated or appointed in the future as an **executive officer** or director of any publicly traded or privately held corporation or other business entity, or any registered investment company, please provide the following information:

<table>
<thead>
<tr>
<th>Name of Company</th>
<th>Public or Private?</th>
<th>*Director?</th>
<th>Compensation Committee Member?</th>
<th>Audit Committee Member?</th>
<th>Executive Officer Position(s) Held</th>
<th>Dates of Service</th>
</tr>
</thead>
<tbody>
<tr>
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<tr>
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<td></td>
<td></td>
</tr>
</tbody>
</table>

* If you are a director of our company, SEC regulations require us to disclose in the proxy statement directorships you currently hold or so held at any time during the last five years in other 1934 Act reporting companies or registered investment companies.

In addition, please indicate if you are now or were at any time during our last fiscal year:

(i) a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose **executive officers** served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of our company;

☐ Yes ☐ No

(ii) a director of another entity, one of whose **executive officers** served on the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of our company;

☐ Yes ☐ No
(iii) a member of the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) of another entity, one of whose executive officers served as a director of our company.

☐ Yes  ☐ No

Note: If you are an executive officer and indicate any relationship under sub-paragraphs (i) to (iii) above, we must disclose that under a special heading for compensation committee interlocks under Regulation S-K 407(e)(4).

1.e Please answer this question only if you are also a director of our Company. SEC rules require that our annual proxy statement disclose the specific experience, qualifications, attributes or skills that led to the conclusion that you should serve as a director of our company in light of our company’s business and structure. If material, this disclosure should cover more than the past five years, including information about your particular areas of expertise or other relevant qualifications. The SEC states that the purpose of this disclosure is to inform investors “whether and why a director or nominee is an appropriate choice for a particular company.”

Please provide below a description of your experience, qualifications, attributes or skills that led to your selection as a director or as a nominee for director:

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

Please attach an addendum to this question 1.e if additional space is needed.
2. **Your Position(s) With Our Company and Its Subsidiaries**

2.a What directorships, offices and other positions have you held with our company at any time since the beginning of our last full fiscal year?

<table>
<thead>
<tr>
<th>Director, Officer, and Other Positions Held</th>
<th>Date Elected or Appointed</th>
<th>Term of Office (if any)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If you did not hold any of these positions for all of our last full fiscal year, please state the portion of that fiscal year during which you held the positions.

________________________________________________________________________

2.b What directorships, offices and other positions have you held with any of our company’s subsidiaries at any time since the beginning of our last full fiscal year?

<table>
<thead>
<tr>
<th>Name of Subsidiary and Positions Held</th>
<th>Date Elected or Appointed</th>
<th>Term of Office (if any)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If you did not hold any of these positions for all of our last full fiscal year, please state the portion of that fiscal year during which you held the positions.

________________________________________________________________________

2.c Is there or was there any arrangement or understanding between you and any other person or persons under which you were (or
will be) selected to serve as a director or as an officer?
☐ Yes  ☐ No

If “yes,” please attach a copy of any written agreement or understanding, or describe the oral arrangement or understanding, and name the other person or persons:

____________________________________________________

2.d Do you have any family relationship with any other director or executive officer of our company or any subsidiary who is serving currently or so served during our last full fiscal year, or with any individual nominated or otherwise chosen for such a position with our company or any subsidiary?

For this purpose, please include any family member as defined in Appendix B and also any aunt, uncle or first cousin family relationship.

☐ Yes  ☐ No

If “yes,” please provide each person’s identity and the nature of the family relationship:

___________________________________________________

2.e FOR EXECUTIVE OFFICERS WHO ARE ALSO DIRECTORS OR NOMINEES FOR DIRECTOR:

(1) [This assumes the company will fill in this information] Please review the following information regarding our last full fiscal year that we have filled in for you:
<table>
<thead>
<tr>
<th>“X” Indicates Bodies on Which You Served</th>
<th>Date Appointed or Period Served</th>
<th>Total Meetings Held in the Last Full Fiscal Year*</th>
<th>Total Meetings You Attended</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board of Directors</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Audit Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compensation Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nominating [and Corporate Governance] Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>[List all other board committees]</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*This includes all regularly scheduled and special meetings, but only those meetings held during the period that you served on the designated body.*

☐ I have no changes to make in the above information.

☐ I have made changes to the above information as indicated.

(2) Please describe any changes in your committee membership(s) since the end of our last full fiscal year:

_________________________________________________________________________________________________________

(3) If you have been or will be nominated for election to our board of directors at the next annual meeting of our
stockholders, do you agree to serve if elected?
☐ Yes  ☐ No

(4) Is there or was there any arrangement or understanding between you and any other person or persons under which you were (or will be) selected to serve as a director?
☐ Yes  ☐ No

If “yes,” please attach a copy of any written agreement or understanding, or describe the oral arrangement or understanding, and name the other person or persons:
____________________________________________________

3. Involvement in Legal Proceedings

3.a At any time during the last ten years:

- Was a petition under the federal bankruptcy laws or any state insolvency law filed by or against, or was a receiver, fiscal agent or similar officer appointed by a court for the business or property of:
  - you;
  - any partnership in which you were a general partner at or within two years before the filing; or
  - any corporation or business association of which you were an executive officer at or within two years before the filing?

- Have you been convicted in a criminal proceeding or are you the subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)?

- Have you been enjoined (even temporarily) from, or otherwise limited from:
Executive Officers’ Annual Questionnaire

- Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of an investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with any of these activities;

- Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of federal or state securities laws or federal commodities laws; or

- Engaging in any type of business practice?

  - Has any federal or state authority barred, suspended or otherwise limited for more than 60 days your right to engage in any of the activities described above in the first section of the preceding bullet point or your right to be associated with persons engaged in any of those activities?

  - Has a court or the Securities and Exchange Commission found that you violated any federal or state securities law?

  - Has a court or the Commodity Futures Trading Commission found that you violated any federal commodities law?

  - Were you the subject of, or a party to, any Federal or State judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of: (i) any Federal or State securities or commodities law or regulation; or (ii) any law
or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order; or (iii) any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity?

- Were you the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization (as defined in Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26))), any registered entity (as defined in Section 1(a)(29) of the Commodity Exchange Act (7 U.S.C. 1(a)(29))), or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member?

- [Has a court convicted you of fraud that has not been overturned or expunged?]

[NOTE: Include bracketed option above for companies that are incorporated or qualified to do business in California. This information is needed to respond to the California “corporate disclosure statement” that must be filed annually within 150 days after the company’s fiscal year end.]

☐ Yes as to any items listed ☐ No as to all

If you answered “yes,” please provide details:

3.b Are you aware of any pending or contemplated legal proceedings in which any person listed below is a party adverse, or has a material interest adverse, to our company or any of its subsidiaries:
• you or any other director or officer of our company or any of its subsidiaries;

• any other affiliate of our company;

• any owner of more than 5% of any class of our company’s voting securities;

• any affiliate or family member of the foregoing persons?
  
  □ Yes  □ No

If you answered “yes,” please provide details:

____________________________________________________

3.c [include this if the company has not been a reporting company under the Securities Exchange Act of 1934 for at least 12 months and has been organized within the past 5 years:] To the best of your knowledge, has any promoter or control person of the company been involved in any proceeding or subject to any order of any of the types described above in this Part 3? A promoter includes a person who alone or with others participated in founding or organizing our company or who received 10% or more of our stock in connection with the founding or organizing of our company for services or property. A control person is one who directly or indirectly controls our company.

□ Yes  □ No

If “yes,” please provide details of each claim and proceeding (including, if known, the date instituted, name of court or agency, principal parties thereto, factual basis and relief sought):

____________________________________________________
4. **Stock Ownership**

4.a Do you know of any person(s) or group(s) that **beneficially own** more than 5% of any class of our outstanding voting securities (other than [insert names of known 5% holders])?  
☐ Yes  ☐ No

If “yes,” please provide the names and addresses of each of these persons or groups:

____________________________________________________

4.b How many shares of our company’s common stock do you (or your **affiliates** or **family members**) beneficially own? If none, please say so.

<table>
<thead>
<tr>
<th>Shares of which you personally are the <strong>beneficial owner</strong></th>
<th>Number of Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of these shares over which you have sole voting power</td>
<td></td>
</tr>
<tr>
<td>Number of these shares over which you have shared voting power</td>
<td></td>
</tr>
<tr>
<td>Number of these shares over which you have sole investment power</td>
<td></td>
</tr>
<tr>
<td>Number of these shares over which you have shared investment power</td>
<td></td>
</tr>
<tr>
<td>Number of these shares that you have a right to acquire within 60 days after <strong>[fill in the estimated date to be used in the proxy statement’s beneficial ownership table]</strong> (such as by exercising stock options, warrants, or conversion or similar rights)</td>
<td></td>
</tr>
</tbody>
</table>
**Executive Officers’ Annual Questionnaire**

<table>
<thead>
<tr>
<th>Shares beneficially owned by your <strong>affiliates</strong> or <strong>family members</strong></th>
<th>Number of Shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of individual/entity: _____________________</td>
<td></td>
</tr>
<tr>
<td>Name of individual/entity: _____________________</td>
<td></td>
</tr>
<tr>
<td>Name of individual/entity: _____________________</td>
<td></td>
</tr>
</tbody>
</table>

Please include: all director’s”qualifying shares”; shares registered in your own name; shares held in your name as trustee, executor, custodian, pledgee, agent, or nominee (alone or with others); and shares held for you by any broker, bank, or other nominee.

If you are not sure whether you or your **affiliates** or **family members** have **beneficial ownership** of our common stock, please contact the person named on the first page of this questionnaire.

Do you or any of your **affiliates** or **family members** have **beneficial ownership** of shares of any other class of our company’s equity securities?

☐ Yes   ☐ No

If “yes,” please provide equivalent ownership information for these other shares so owned:

__________________________________________
4.c  Are there any shares that you listed in response to question 4.b that you may be deemed to beneficially own, but of which you would like to disclaim beneficial ownership? ☐ Yes ☐ No

If “yes,” please provide the reason for disclaiming and the name of each person who should be shown as the beneficial owner of the shares in question, along with the person’s relationship to you and the number of shares that the person beneficially owns:

____________________________________________________

4.d  Are any shares of stock that you beneficially own pledged (or intended to be pledged in the future) with a lender or other third party as security for any obligations?

☐ Yes  ☐ No

Please list shares subject to any form of pledge, margin loan, hypothecation, lien, or other arrangement with a lender, broker, or other third party, in which these shares serve as collateral for any of your obligations or for obligations of any other person.

If “yes,” please specify the number of shares pledged and nature of the related transaction(s):

____________________________________________________

4.e  Do you or any of your affiliates or family members participate in investment decisions made by any corporation, partnership, limited liability company, or other business or investment entity, or by any nonprofit organization, that owns our securities? ☐ Yes ☐ No
If “yes,” please provide details and state whether you disclaim **beneficial ownership** of those securities:

4.f Have you or a **family member** of yours who lives in your household entered into a contract, issued an instruction or established a plan (other than under a savings or compensation plan or dividend reinvestment plan of ours) that provides for the purchase or sale of our stock in the future? (These are often called pre-arranged trading plans or Rule 10b5-1 plans.)

☐ Yes  ☐ No

4.g Do you know of any arrangement, or believe that any arrangement exists, through which more than 5% of our stock is held or is to be held pursuant to a voting trust or other similar agreement?

☐ Yes  ☐ No

If “yes,” please provide a copy of any agreement relating to each arrangement or describe all material terms of each arrangement:

4.h Do you know of any arrangements that have already caused, or could result in the future in, a change in **control** of our company (other than ordinary default provisions contained in our charter, trust indentures or other governing instruments relating to our common stock)? These arrangements may include:

- a pledge by any person of equity securities;
- a deposit of equity securities as collateral;
- creation of a voting trust or similar agreement; or
- a contract providing for the sale, put, call, or other disposition of equity securities.
☐ Yes  ☐ No

If “yes,” please provide the names and addresses of the parties to each arrangement and a brief description of each arrangement:

____________________________________________________

5. Executive Officer Compensation for Our Last Full Fiscal Year

5.a Our company has filled out information in Appendix A listing compensation to you from our company and its subsidiaries for our last full fiscal year, that is intended to include all plan or non-plan compensation awarded to, earned by or paid to you for all services rendered in all capacities to our company or its subsidiaries.

☐ I have no changes to make in Appendix A and confirm that I have not earned or received or been awarded any compensation with respect to the company’s last full fiscal year that is not listed in Appendix A.

☐ I have made changes to Appendix A as needed to report all compensation earned or received by me or awarded to me with respect to the company’s last full fiscal year.

5.b Are you aware of any program, plan or practice since the beginning of our last full fiscal year to:

• select stock option grant dates for directors, executive officers or others in coordination with the release of material non-public information (whether the information is positive or negative); or

• set the exercise price of stock options for any directors, executive officers or others on a date other than the actual grant date (excluding any express provisions of an equity compensation plan approved by our stockholders that fix
or determine the exercise price in a specified manner)?
☐ Yes ☐ No

If “yes,” please provide a brief description of each program, plan or practice:

____________________________________________________

5.c At any time during our last full fiscal year, did our company (whether acting through its board of directors, a board committee, its officers or otherwise):

- adjust or amend the exercise price of stock options or stock appreciation rights previously awarded to any executive officer (whether through amendment, cancellation or replacement grants or any other means); or

- otherwise modify in any way any stock options, stock appreciation rights, restricted stock awards, restricted stock units or other form of equity awards held by any executive officer (including but not limited to any extension of exercise periods, change of vesting or forfeiture conditions, change or elimination of applicable performance criteria, or change of the bases upon which returns are determined)?
  ☐ Yes ☐ No

If “yes,” please provide a brief description of each such adjustment, amendment or modification:

____________________________________________________

5.d Other than the express provisions of our equity compensation plans approved by our stockholders, are you a party to or participant in any contract, agreement, plan or arrangement (whether written or unwritten) that provides for payment(s) to you at, following or in connection with any termination of your
5.e Other than as listed immediately above, are you a party to any written or unwritten employment contract, agreement, plan or arrangement?

If “yes,” please provide a brief description of each such contract, agreement, plan or arrangement:

5.f Except described elsewhere in this questionnaire, are you aware of any transaction between us (or any of our subsidiaries) and any third party, the primary purpose of which is to furnish compensation to any of our officers or directors, including yourself?

If “yes,” please provide details, including the monetary value of the transaction:

6. Related Person Transactions

6.a Did you or any of your family members have, or will you or any of your family members have, any direct or indirect interest in any transaction since the beginning of our last full fiscal year or any currently proposed transaction in which our company or any of its subsidiaries was or is to be a participant?
Please review the instructions below before answering the above question
☐ Yes  ☐ No

If “yes,” please describe each transaction, the **amount involved** in the transaction, all participants in the transaction, and the nature, value and extent of the **direct or indirect interest** in the transaction (please attach additional pages if needed):

____________________________________________________

You can **exclude**:

- Any compensation arrangement for your own services that is described elsewhere in this questionnaire;

- A transaction where your interest in the other party arises only from (x) your position as a director of a corporation that is the other party, or only from your direct and indirect ownership of less than a 10% equity interest in that corporation (or both), or (y) your direct and indirect ownership of less than a 10% equity interest as a limited partner in a partnership in which you are not a general partner and do not hold any other position.

Please consider and include, if otherwise applicable, all transactions, arrangements or relationships of any kind (including any financial transaction, any indebtedness or any guarantee of indebtedness), and any series of similar transactions, arrangements or relationships. “Indirect interests” include any interest your **affiliates** had or will have, and any other form of indirect interest.

Please report any of the following transactions in which you or a **family member** had or has a direct or indirect interest: any loan, extension of credit, guaranty, finance, purchase, sale, lease, license, assignment, supply, customer, service, manufacturing,
or other contract, arrangement, transaction or relationship in which our company or any subsidiary is a participant. If you are an owner, principal, partner, manager, employee, or other professional service provider for any investment banking, law, accounting, consulting or other professional services firm that provides any services to our company or any of its subsidiaries, please report the details of that relationship if you have any direct or indirect interest in the service agreement or contract with our company or any subsidiary.

Please include any otherwise covered transaction in which any of your adult children or in-laws or any other family member has a direct or indirect interest, including, if applicable, any employment or service provider agreements directly between such family member and our company or any of its subsidiaries, or any situations where our company or its subsidiaries does business with or makes charitable contributions to another entity that employs or is owned or controlled by any of your family members.

6.b Please complete Appendix C, which is a list of your family members and others who may be “related persons” or “related parties” under SEC definitions and accounting standards. This is intended to help you respond to the question above, and also help us keep a list of family members and other persons that we may need to monitor for purposes of our related person transaction policy.

We would like the opportunity to assess and discuss with you the nature of any direct or indirect interest you or family members had or may have in a transaction with us for purposes of the SEC rules and accounting standards.

6.c Are you aware of any transaction of the type described in question 6.a in which a beneficial owner of more than 5% of any class of our company’s equity securities or any family member of such a share owner had or has any direct or indirect
interest?  
☐ Yes  ☐ No  

If “yes,” please provide details:

______________________________

6.d Are there any other relationships between you and us or our management that are substantially similar in nature and scope to those described in question 6.a?  
☐ Yes  ☐ No  

If “yes,” please provide details:

______________________________

6.e Are you or any affiliate or family member of yours a party to any contract with us or any of our subsidiaries that is or was to be performed in whole or in part during our last full fiscal year or our current fiscal year, which you have not described elsewhere in this questionnaire?  
☐ Yes  ☐ No  

If “yes,” please provide details:

______________________________

6.f If you have reported any transaction under questions 6.a through 6.e, was the transaction disclosed to and approved or ratified by our company’s board of directors or a committee of independent directors?  
☐ Yes  ☐ No  ☐ Not applicable  

6.g If you have disclosed any transaction under questions 6.a through 6.e, and the transaction was approved or ratified by our company’s board of directors or a committee of independent directors, was there any waiver of or other deviation from otherwise applicable policies and procedures established by our
company for such a transaction?
☐ Yes    ☐ No    ☐ Not applicable

6.h Are you aware of any direct or indirect business relationship between our company or any of our company’s directors or officers, on the one hand, and our independent registered public accounting firm or any of that firm’s partners, managers or employees, on the other hand?
☐ Yes    ☐ No

If “yes,” please provide details below:

________________________________________________________________________

7. **Relationships with Compensation Consultants**

*Appendix D* to this questionnaire lists each individual at each compensation consultant that is providing or provided executive or director compensation consulting services to us during our last completed fiscal year.

Do you have or did you have during the last completed fiscal year any business or personal relationship with [insert name of compensation consultant(s)] or any of the individuals identified on *Appendix D*?
☐ Yes    ☐ No

---

2 In 2012, the SEC adopted new disclosure requirements regarding compensation consultants and conflicts of interest. Companies are required to disclose any conflicts of interest with regard to any compensation consultant providing, or that provided during the company’s last completed fiscal year, services that involve determining or recommending the amount or form of executive and director compensation other than when such consulting services are limited to consulting on any broad-based plan that is generally available to all salaried employees and which plan’s terms do not discriminate in favor of executive officers or directors of the company. Companies must comply with the SEC’s new disclosure requirements in any proxy or information statement for an annual meeting of stockholders (or special meeting in lieu of an annual meeting) at which directors will be elected occurring on or after January 1, 2013. This section is designed to assist in obtaining information about whether a conflict exists that must be disclosed in the company’s proxy statement. It may also assist in assessing the independence of advisers to the compensation committee, which became required as of July 1, 2013.
If “yes,” please provide the following information:

<table>
<thead>
<tr>
<th>Date Relationship Began (month &amp; year)</th>
<th>Date Relationship Ended (month &amp; year)</th>
<th>Names and Titles of Individuals at the Compensation Consultant</th>
<th>Nature of Business or Personal Relationship</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

8. **Section 16 Filing Requirements**³ [Delete if Separate Memo is Used]

8.a Except as described below, I represent to the company that:

- I have timely filed all Forms 3, 4 and 5 with the Securities and Exchange Commission required to be filed during our company’s last full fiscal year to report my beneficial ownership and changes in my beneficial ownership of the company’s common stock; and

---

³ Insider trading enforcement continues to be a top priority of the SEC. In September 2014, the SEC announced (http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678) charges against 28 officers, directors or major stockholders for failing to promptly report information about their holdings and transactions in company stock. Six public companies were also charged for contributing to filing failures by insiders or failing to report their insiders filing delinquencies. SEC enforcement staff used quantitative data sources and ranking algorithms to identify these insiders as repeatedly filing late. It is unusual for the SEC to bring so many actions at once; the SEC continues to send a clear signal to insiders that the reporting requirements under the federal securities laws are not just suggestions but are legal obligations to be followed. For public companies that voluntarily assist insiders in complying with these filing requirements, the SEC’s enforcement actions make it clear that failure to comply with this voluntary responsibility carries with it serious consequences.
• I am not required to file a Form 5 with respect to the company’s last full fiscal year.

Please indicate below that there are no exceptions necessary to make the above statements accurate, or, if there are exceptions, describe those exceptions in reasonable detail by attaching a copy of the Form 5 reporting the required transactions or by listing transactions and/or forms not filed or filed late.

☐ No exceptions.

☐ Describe exceptions:

____________________________________________________

I acknowledge that the Company will rely on the statements above for purposes of making any required disclosure of delinquent Forms 3, 4, or 5 filings in its SEC filings.

A Form 5 is required to report:

• any holdings or transactions which were exempt from reporting on Form 4 and which were not voluntarily reported on Forms 4 previously (such as gifts and inheritances, and certain fund switch transactions involving our company’s stock (if any) under 401(k) or other tax-qualified plans);

• any holdings or transactions that should have been reported during the most recently completed fiscal year but have not been reported; and

• as to the first Form 5 requirement for a reporting person, any holdings or transactions that should have been reported during the most recently completed two fiscal years, but were not reported before the Form 5 due date.
Certain transactions under a qualified employee stock purchase plan and ongoing acquisitions of our company stock (if any) under 401(k) plans (other than by the change in investment of existing plan funds) are exempt from reporting altogether (subject to updating total holdings in forms otherwise required to be filed).

If you have any questions regarding whether you are required to file a Form 5 for our last full fiscal year, please call the person named on the first page of this questionnaire.

9. Iran Threat Reduction and Syria Human Rights Act
[Optional Section—Given the nature and subject matter of certain questions contained in this section, the company may prefer to verbally discuss and monitor periodically these matters with executive officers rather than including them in this questionnaire.]4

For purposes of this Part 9, you are an “affiliate” of a person if you directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, that person. Also, generally, for purposes of this Part 9, the company is not required to report on the activities of another

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4 In 2012, President Obama signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) which represents a significant expansion of US sanctions targeting Iran because, among other things, it (i) subjects non-US entities owned or controlled by US entities to the Iranian Transactions Regulations and makes US parent companies liable for any violations, (ii) requires publicly traded companies engaging in certain types of Iran-related business to publicly disclose such business to the SEC, and (iii) significantly expands the petroleum-related sanctions in the Iran Sanctions Act. The ITRA requires companies subject to the reporting requirements of Section 13(a) of the Exchange Act to publicly disclose specific information about certain Iran-related activities in annual and quarterly reports filed with the SEC for reports due on or after February 6, 2013. Because executive officers may be deemed affiliates under this reporting requirement, the questions included in this section address this subject matter for the most recent fiscal year and the Declaration and Signature page includes a provision that the executive officer will update the company if any answers to these questions change throughout the next fiscal year’s quarterly periods since the reporting requirements cover quarterly periods as well. The company may prefer to instead discuss and monitor periodically with each executive officer, or particular executive officers, the subject matter contained in these questions.
entity where the only relationship between the company and the other entity is that you also serve as an outside director to that entity. To your knowledge, during the last fiscal year:

9.a Have you or any of your affiliates knowingly engaged in any activities or transactions relating or contributing to Iran’s petroleum or petroleum products industries or Iran’s ability to acquire or develop weapons of mass destruction, conventional weapons or other military capabilities?
- Yes
- No

9.b Have you or any of your affiliates knowingly engaged in: any activities or transactions that finance or facilitate the Iranian government’s acquisition or development of weapons of mass destruction or that may support or facilitate terrorism; any transactions with an Iranian financial institution to finance or otherwise support Iran’s ability to acquire or develop weapons of destruction or international terrorism; or any activities or transactions with or that finance or otherwise benefit Iran’s Islamic Revolutionary Guard Corps?
- Yes
- No

9.c Have you or any of your affiliates knowingly engaged in: any transfers of products or technology or provision of services to Iran that are likely to be used by the Iranian government for human rights abuses against the Iranian people; or any transfers of technology that could be used by the Iranian government to restrict the free flow of unbiased information in Iran or disrupt, monitor or otherwise restrict speech of the Iranian people?
- Yes
- No

9.d Have you or any of your affiliates knowingly engaged in or conducted any transactions with the Iranian government or any political subdivision or agency or any entity owned or controlled by the Iranian government without authorization from a US federal department or agency or with any persons or entities whose assets are frozen pursuant to executive orders for their
involvement with weapons of mass destruction or terrorism?  
☐ Yes   ☐ No

If you answered yes to any of the questions above, please provide further details of each such transaction or activity:

10. **Foreign Corrupt Practices Act [Optional Section]**

In this section:

- Each question applies to activities or conduct inside and outside the United States of America.

- The terms “payments” and “contributions” include cash, hard goods, services, use of property and anything else of value.

- Include acts done through intermediaries, such as payments to sales agents or representatives that are passed on in whole or in part to purchasers, or compensation or reimbursement to persons in consideration for their acts.

- Please include all matters that you have a reasonable basis to believe occurred (that is, any matters of which you have direct personal knowledge, as well as matters that you may not be certain occurred from your own direct or personal knowledge but as to which you know of credible evidence indicating that the matter may have occurred).

10.a Do you believe that our company, its subsidiaries, or any directors, officers, employees, agents, consultants, sales representatives or others acting on behalf of or for the benefit of our company or its subsidiaries, have engaged at any time in:

- Any bribes or kickbacks to government officials or their relatives, or any other payments to such persons, whether
or not legal, to obtain or retain business or to receive favorable treatment with regard to business?
☐ Yes    ☐ No

• Any bribes or kickbacks to persons other than government officials, or to relatives of such persons, or any other payments (whether or not legal) to such persons or their relatives to obtain or retain business or to receive favorable treatment with regard to business?
☐ Yes    ☐ No

• Any contributions, whether or not legal, made to any political party, political candidate or holder of governmental office?
☐ Yes    ☐ No

• Any bank accounts, funds or pools of funds created or maintained without being accurately recorded or identified in our books and records, or as to which the receipts and disbursements from these accounts have not been accurately recorded or identified in our books and records?
☐ Yes    ☐ No

• Any receipts or disbursements, the actual nature of which has been “disguised,” hidden or otherwise not fully documented in our books and records?
☐ Yes    ☐ No

• Any fees paid to consultants or commercial agents that exceeded the reasonable value of the services purported to have been rendered?
☐ Yes    ☐ No
• Any payments or reimbursements made to our personnel for the purposes of enabling them to do anything referred to under this Part 10?
  □ Yes    □ No

If you answered “yes” to any of these questions, please provide details:

________________________________________________________________________
Declaration and Signature

I understand that my answers will be used in the preparation of one or more documents to be filed by our company with the Securities and Exchange Commission.

If, at any time before [insert date], any of my answers to this questionnaire or the information I am providing becomes incorrect (for example, due to the passage of time, as a result of subsequent developments or because I realize that I provided an incorrect response), then I will promptly furnish to the person named on the first page of this questionnaire any necessary or appropriate correcting information. Otherwise, the above information continues to be, to the best of my knowledge, complete and correct.

[Additionally, I understand that the Iran Threat Reduction and Syria Human Rights Act of 2012 requires the company to publicly disclose specific information about relevant Iran-related activities in its annual and quarterly reports filed with the SEC. I will promptly notify the person named on the first page of this questionnaire if my answers to the questions contained in Part 9 of this questionnaire require updating throughout the quarterly periods in the company’s next fiscal year.]5

Date: ________, 20__

Signature: __________________

Name: __________________

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5 Consider including this declaration only if you include the questions in Part 9 to help ensure that executive officers understand the reporting requirements under the Iran Threat Reduction and Syria Human Rights Act of 2012 are both quarterly and annually. If the company prefers not to include this declaration, consider polling or discussing these matters with the executive officers on a quarterly basis.
Appendix A¹

Executive Officer Compensation Summary

[edit as appropriate to your company’s compensation structure]

Set forth below is a summary of compensation, based on our company’s records, that was awarded to, earned by, or paid to you for all services rendered in all capacities for our company’s fiscal year ended __________, 20__. Please correct any information below that is incomplete or inaccurate in any way. Under SEC rules, “incentive” awards are equity or non-equity awards earned upon achieving a performance measure over a specified period (whether based on financial, stock price or other performance). Amounts deferred under a 401(k) plan or other deferred compensation plan are not deducted from categories below.

Summary of Fiscal Year _____ Compensation for Officer: [Name]

<table>
<thead>
<tr>
<th>Category of Compensation</th>
<th>Amount ($ or # of shs)*</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salary (annualized, whether payable in cash or non-cash form)</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Bonus (earned with respect to our last full fiscal year in cash or non-cash form)</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>

¹ Important Note: SEC regulations under the Dodd-Frank Act of 2010 require disclosure of golden parachute compensation arrangements in any proxy or consent solicitation to approve an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all assets of an issuer. Issuers may choose to include this disclosure in the annual meeting proxy statement. We recommend that you review the regulations together with the Baker & McKenzie attorney with whom you work.
**Summary of Fiscal Year ____ Compensation for Officer: [Name]**

<table>
<thead>
<tr>
<th>Category of Compensation</th>
<th>Amount ($) or (# of shs)*</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Stock awards:**

- [RSUs granted on _______, 20___:] __________ shs
  [incentive/time vesting]

- [Restricted stock granted on ________, 20___:] __________ shs
  [incentive/time vesting]

**Option awards and stock appreciation rights:**

- Options granted on ________, 20___:] __________ shs
  [incentive/time vesting]

- Stock appreciation rights granted on ________, 20___:] __________ shs
  [incentive/time vesting]

**Non-equity incentive plan compensation**

- earned in or for the fiscal year under performance criteria, whether or not paid out during the year

- Awards granted under non-equity incentive compensation plan

- Aggregate change in the actuarial present value of any accumulated benefit under all defined benefit and actuarial pension plans (including supplemental plans) and above-market or preferential earnings on deferred compensation that is not tax-qualified

- **All other compensation (total:__________):** __________$
### Summary of Fiscal Year _____ Compensation for Officer: [Name]

<table>
<thead>
<tr>
<th>Category of Compensation</th>
<th>Amount ($ or # of shs)</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perquisites and other personal benefits (see sub-table below)</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>All “gross ups” or other amounts reimbursed during the last full fiscal year for the payment of taxes</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Securities you purchased from our company or its subsidiaries at a discount (unless the discount is generally available to all security holders or salaried employees)</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Any amount paid or accrued to you under a plan or arrangement in connection with the resignation, retirement, severance or constructive termination (including a change in responsibilities) or other termination of your relationship with our company or a change in control of our company</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Our company’s contributions or other allocations to vested and unvested defined contribution plans (e.g., 401(k) plans)</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>The dollar value of any insurance premiums paid by, or on behalf of, our company during the last full fiscal year with respect to life insurance for you</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant fair value required to be reported for the stock or option awards listed above</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>
### Summary of Fiscal Year _____ Compensation for Officer: [Name]

<table>
<thead>
<tr>
<th>Category of Compensation</th>
<th>Amount ($ or # of shs)*</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any other plan or non-plan compensation awarded to, earned by or paid to you for all services rendered in all capacities to our company or its subsidiaries, including any transaction between our company and a third party where any purpose of the transaction is to furnish compensation to you</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>

* Although we must report the dollar value of equity awards in the proxy statement, we are confirming here only the number of shares under equity awards granted and will compute and include the applicable dollar value in the draft proxy statement to be circulated.

### Guidance on evaluating perquisites:

SEC rules impose specific requirements for identifying and disclosing perquisites and personal benefits for executive officers. We have endeavored to list a total perquisite and personal benefit amount above (if applicable) based on our company’s records. However, we need you to review the following details and help assure that we have accurately recorded these amounts. Please edit the following chart for this purpose as needed to provide an accurate summary of perquisites or personal benefits received, with an “X” in each category that is not applicable.

Generally, a perquisite is a benefit to you that (1) is not integrally and directly related to your duties as an officer, and (2) confers a direct or indirect benefit that has a personal aspect. Tax treatment has no bearing on this analysis.

Typically, perquisites do not include paid travel to and from business or directors’ meetings, other business travel, business entertainment, security during business travel, and itemized expense accounts the use of which is limited to business purposes.
Perquisite Analysis for Officer [insert name] for Fiscal Year _____

<table>
<thead>
<tr>
<th>Personal (non-business) use or benefit paid or provided by our company or any of its subsidiaries in the form of:</th>
<th>Amount</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Club use/fees/dues not exclusively used for business entertainment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commuting expenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased motor vehicle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased airplane</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased watercraft</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased lodging or other real estate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased personal property or company-paid service (computer, PDA, cell phone, etc.) for personal use</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discounts on company or third party products or services (not generally available)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entertainment events not for business purposes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial, tax, legal, investment or other professional services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Housing, home repair, maintenance or improvement, home office, or similar expenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inventor compensation program</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Meals not for business purposes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal vacation or other personal travel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Relocation assistance or payments that permit you to continue living at your residence</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Perquisite Analysis for Officer [insert name] for Fiscal Year _____

<table>
<thead>
<tr>
<th>Personal (non-business) use or benefit paid or provided by our company or any of its subsidiaries in the form of:</th>
<th>Amount</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secretarial services or other use of company employees for personal matters</td>
<td></td>
<td></td>
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<tr>
<td>Security services at your residence or for personal travel</td>
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<td></td>
</tr>
<tr>
<td>Travel, lodging, entertainment, meal or other personal expenses for any family member or personal friends to accompany you on travel for director meetings, other company business or tours, or for non-business personal travel</td>
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</tr>
</tbody>
</table>
Appendix B

Definitions

For purposes of this questionnaire, unless otherwise indicated in the particular section of the questionnaire:

“affiliate” of a specified person means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the specified person.

For purposes of this questionnaire, you should assume that any corporation, other entity, or trust or estate is an affiliate of yours if you are an executive officer, manager or similar controlling person, or trustee or executor of the trust or estate, or the direct or indirect beneficial owner of more than 10% of any class of equity securities of the entity, or if you otherwise in fact control the entity.

A person will be deemed not to be in control of a corporation for this purpose if the person:

• is not the beneficial owner, directly or indirectly, of more than 10% of any class of equity securities of the other person;

• is not an executive officer of the other person; and

• is not a director of the other person.

Similar principles would apply by analogy to partnerships, trusts, estates or other entities.

A director, executive officer, partner, member, principal or designee of an affiliate of another person will also be deemed to be an affiliate of that other person.

“amount” or “amount involved” means the dollar value of the amount involved in the transaction or a series of transactions, without
regard to profit or loss on the transaction, including (i) the aggregate amount of periodic payments or installments due on or after the beginning of our last full fiscal year including any required or optional payments due at the end of the transaction, and (ii) in the case of indebtedness, the highest amount of aggregate outstanding principal indebtedness since the beginning of our last full fiscal year, plus interest payable on it during the fiscal year.

“beneficial ownership” of a security means a person’s ability, directly or indirectly through any contract, arrangement, understanding, relationship or otherwise, to exercise alone or together with others:

- voting power, which includes the power to vote, or to direct the voting of, a security; or
- investment power, which includes the power to dispose, or to direct the disposition, of a security.

This term also includes having the right to acquire beneficial ownership of a security within 60 days, including any right to acquire the security through the exercise of any option, warrant or right, through the conversion of a security, pursuant to the power to revoke a trust, discretionary account or similar arrangement or pursuant to the automatic termination of a trust, discretionary account or similar arrangement.

“control” means the possession, directly or indirectly, of the power to cause the direction of the management and policies of a person, whether through the ownership of securities, by contract or otherwise. An executive officer or director of a company generally is considered to control that company. If you are in doubt as to the meaning of control in a particular context, you may wish to consult with counsel.
“executive officer” means a company’s chairman, vice chairman, president, principal financial officer, principal accounting officer, any vice president in charge of a principal business unit, division or function (such as marketing, administration or finance), any other officer who performs a policy-making function or any other person who performs similar policy-making functions. Executive officers of subsidiaries may be deemed executive officers of the parent company if they perform these sorts of policy-making functions for the parent company.

“family member” of a person mean the person’s spouse, and each parent, stepparent, child, stepchild, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of the person, and anyone (other than a tenant or employee) who resides in the person’s home and any other family member who might control or influence you, or who might be controlled or influenced by you, because of the family relationship. This includes the listed family members whether they are minors or adults, and whether or not adopted.

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1 Including these positions is optional; whether each of these positions is considered to be an "executive officer" position is fact specific to each company.
# Appendix C

## RELATED PERSON TABLE FOR: [NAME]

<table>
<thead>
<tr>
<th>Name</th>
<th>Name of corporation, partnership, trust, or other entity in which named person beneficially owns more than 1% of any class of equity security or other class of ownership interest (Please include approximate% of ownership interest)</th>
<th>Name of corporation, partnership, trust, or other entity in which named person is an executive officer, general partner, or manager, or has a similar role (Please include title/role of named person in entity)</th>
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<tbody>
<tr>
<td>You</td>
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</table>

Children and stepchildren:

Parents and stepparents:

Your spouse:

Your sisters and brothers:

Your mothers-in-law and fathers-in-law:

Your daughters-in-law and sons-in-law:

Your sisters-in-law and brothers-in-law:

Any person sharing your household (other than a tenant or employee):

Any family member (other than those listed above) who might control or influence you, or who might be controlled or influenced by you, because of the family relationship (ASC 850-10)
Appendix D
Compensation Consultants

[For each individual at [name of compensation consultant] providing executive or director compensation consulting services, provide name and title below.]

[Insert name of compensation consultant]

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
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</tbody>
</table>
INSTRUCTIONS FOR USE:

We have designed this questionnaire to help companies gather information from their non-employee directors and nominees for non-employee director in connection with the preparation of the annual proxy statement and Part III of the annual report on Form 10-K. We have a separate questionnaire designed for executive officers so that they can answer only questions relevant to them. This questionnaire is designed primarily for use by listed US domestic issuers that are not the types of entities that receive special treatment under the applicable SEC rules and exchange standards, such as controlled companies, smaller reporting companies and foreign private issuers. In addition, companies whose securities trade on markets other than the NYSE and NASDAQ should conform to their individual markets’ listing standards, which this questionnaire does not address.

Latest Developments

On June 10, 2014, the Public Company Accounting Oversight Board (PCAOB) adopted Auditing Standard No. 18 (AS 18), Related Parties, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. The SEC approved the rules on October 21, 2014. Directed at auditors, the new and amended auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions, and (3) a company’s financial relationships and transactions with its executive officers. AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within these fiscal years. Part 6 “Related Person Transactions,” along with Appendix C, is designed to assist in obtaining information about related persons and related person transactions (as defined in Regulation S-K, Item 404 and Accounting
Standards Codification (ASC) 850) and may assist with obtaining the information the auditors will now be required to review under AS 18.

The following are some suggestions for tailoring this form to your company's use:

- We recommend that you consult the SEC’s updated compliance and disclosure interpretations (CDIs) periodically in preparing your company’s annual disclosures with information derived from this questionnaire. The CDIs are periodically updated by the SEC and contain questions that may be germane to your disclosure. The CDIs are available at [http://www.sec.gov/divisions/corpfin/cfguidance.shtml](http://www.sec.gov/divisions/corpfin/cfguidance.shtml).

- Modify question 1.c depending on whether you include a director biography to edit.

- Modify Part 5 and Appendix A concerning director compensation in a manner that is appropriate to your fact-gathering process and director compensation arrangements. There is no “one size fits all” approach to this aspect since public companies’ director compensation practices vary.

- Retain the appropriate Part 7 covering listing standard independence definitions depending on whether your company’s shares are listed on the NYSE or NASDAQ.

- Modify questions 8.g and 8.i depending on the listing standards that apply to your company.

- In order to gather the additional data necessary for the independence assessment of compensation committee members and nominees for membership, include the compensation committee questions in Part 9.b and remove the drafting footnotes.
• Determine if you want to include the questions about sanctionable activities with Iran (see discussion of Iran Threat Reduction and Syria Human Rights Act of 2012 herein) and retain or remove Part 12 accordingly.

• Change other bracketed language and modify names, dates and commentary, including footnotes, as needed.

Also note that this questionnaire should not be used in connection with registration statements without further review of SEC regulations. Additionally, if your company plans to rely on Regulation D for private placements, you should consider adding appropriate questions to address the new “bad actor” provisions of Rule 506; see our client alert at http://www.bakermckenzie.com/files/Publication/7601023b-8312-4a52-81a3-272afe3bc3f0/Presentation/PublicationAttachment/b091f45b-fb4b-49ed-b389-2fb40fb1985a/al_na_general_solicitationadvertising_jul13.pdf. We recommend that you consult with the Baker & McKenzie attorney with whom you work if you have any questions.

This questionnaire is current only as of October 2015. Future regulations implementing the Dodd-Frank Act may require your company to adopt changes to this questionnaire. This form of questionnaire is for informational purposes only and may not be relied upon as legal advice.
MEMORANDUM

TO: [name of director]

FROM: [sender — e.g., general counsel]

SUBJECT: Annual Questionnaire for Non-Employee Directors [and Nominees for Non-Employee Director]

DATE: ____________, 20__

I am circulating this questionnaire to our non-employee directors [and nominees for non-employee director] in order to collect and verify information that we will use in our Form 10-K and proxy statement that we will file with the Securities and Exchange Commission.

After you have completed this questionnaire, please sign, date and return it by ____________, 20__ in the enclosed envelope or email it to me at ____________. Please retain a copy of the completed questionnaire for your records.

If you need more space to answer any questions, please feel free to attach additional sheets of paper. If you have any questions about any part of this questionnaire, please contact __________ at (____) ____-____ or __________@________.com.

Terms that appear in bold type in this questionnaire have special meanings defined in the attached Appendix B.

Terms such as “we,” “us” and “our” refer to [company name] and its subsidiaries unless the context otherwise indicates.

References to our “last full fiscal year” mean the year ended ____________, 20__.

For your information in filling out this questionnaire, we [are attaching pages from prior SEC filings to assist your review] [or]
[have filled in certain information below relating to meetings, stock and compensation matters based on company records.] [Please check carefully all information that we have filled in below and make any necessary changes if this information does not appear to be correct.]

Please answer each item in the questionnaire clearly, truthfully and comprehensively. The information requested is for your protection and that of our company, and will be used to assure that related information in our SEC filings is correct.
# Annual Questionnaire for Non-Employee Directors [and Nominees for Non-Employee Director] of [insert company name]

## Table of Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Cross Reference to Rule Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Your Business Background</td>
<td>S-K 401(a) and (e)</td>
</tr>
<tr>
<td>2. Your Position(s) With Our Company and Its Subsidiaries</td>
<td>S-K 401(a), (d); 407(b)</td>
</tr>
<tr>
<td>3. Involvement in Legal Proceedings</td>
<td>S-K 401(f); S-K 103 instr. 4 &amp; Schedule 14A Item 7(a)</td>
</tr>
<tr>
<td>4. Stock Ownership</td>
<td>S-K 403(a), (b), (c); 14A Item 6(e)</td>
</tr>
<tr>
<td>5. Director Compensation for Our Last Full Fiscal Year</td>
<td>S-K 402(k)</td>
</tr>
<tr>
<td>6. Related Person Transactions</td>
<td>S-K 404(a), (b)(2); S-X 2.01(c)(3); ASC 850</td>
</tr>
<tr>
<td>[7. Independence Standards&lt;sup&gt;1&lt;/sup&gt; for NYSE Companies]</td>
<td>S-K Item 407(a)(1, 3), NYSE Listed Company Manual Section 303A</td>
</tr>
</tbody>
</table>

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<sup>1</sup> On October 2, 2015, the Delaware Supreme Court held in *Del. Cnty. Emp. Ret. Fund, et al. v. Sanchez, et al.*, 2015 WL 5766264 (Del. Oct. 2, 2015) that a director’s personal and business relationships with an interested party must be reviewed in their totality when considering a director’s independence, and that a long-term friendship carries a greater inference of compromise of independence than do more superficial relationships. Although the tests for independence under Delaware law as compared to those under the NYSE and NASDAQ listing standards serve different purposes and reflect the common law versus quasi-legislative nature of their respective purveyors, companies may still want to consider this case as they are making their annual independence assessments and consider any additional areas of inquiry in D&O Questionnaires.
<table>
<thead>
<tr>
<th>Topic</th>
<th>Cross Reference to Rule Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>[7. Independence Standards(^1) for NASDAQ Companies]</td>
<td>S-K Item 407(a)(1, 3), NASDAQ Listing Rule 5605</td>
</tr>
<tr>
<td>8. Audit Committee Special Questions</td>
<td>Applicable listing standard and SEC Rule 10A-3</td>
</tr>
<tr>
<td>9. Compensation Committee Special Questions(^2)</td>
<td>S-K 407(e), Section 162(m) and Rule 16b-3</td>
</tr>
<tr>
<td></td>
<td>Exchange Act Sections 10C(a)(1) – 10C(a)(3); Exchange Act Rule 10C-1(b)(1)</td>
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<tr>
<td></td>
<td>NYSE Listed Company Manual Section 303A.02(a)(ii); NASDAQ Listing Rule 5605(d)(2)(A)</td>
</tr>
</tbody>
</table>

\(^2\) This section contains certain questions regarding committee member independence which became effective in 2014. See drafting notes in Part 9.b for further commentary.
<table>
<thead>
<tr>
<th>Topic</th>
<th>Cross Reference to Rule Source</th>
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<tbody>
<tr>
<td>10. Relationships with Compensation Consultants</td>
<td>S-K 407; Exchange Act Section 10C(b); Exchange Act Rule 10C-1(b)(4); NYSE Listed Company Manual Section 303A.05(c)(iv); NASDAQ Listing Rule 5605(d)(3)(D)</td>
</tr>
<tr>
<td>11. Section 16 Filing Requirements [Delete if Separate Memo is Used]</td>
<td>S-K 405</td>
</tr>
<tr>
<td>13. Foreign Corrupt Practices Act [Optional Section]</td>
<td></td>
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<tr>
<td>Declaration and Signature</td>
<td></td>
</tr>
<tr>
<td>Appendix A – Director Compensation Summary</td>
<td>S-K 402(k)</td>
</tr>
<tr>
<td>Appendix B – Definitions</td>
<td></td>
</tr>
<tr>
<td>Appendix C – Related Person Table</td>
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<tr>
<td>Appendix D – Compensation Consultants</td>
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</tbody>
</table>

3 This section contains questions regarding compliance with the Iran Threat Reduction and Syria Human Rights Act of 2012. Given the nature of certain questions contained in this section, the company may prefer to verbally discuss these matters with directors rather than including them in this questionnaire. See drafting notes in Part 12 for further commentary.
1. Your Business Background

1.a How do you wish your name to appear in our SEC filings?

____________________________________________________

1.b What is your date of birth?

_______________________________

[1.c [for companies with completed director biographies:] Please edit, as needed, the following paragraph that must at a minimum provide information about your business experience during the last five years, including the name of employer (or self-employed), the type of business of the employer, positions you held, and the nature of your responsibilities:

[insert individual’s biography]

☐ I have no changes to make in the above biographical information.

☐ I have made changes to the above biography as indicated.

[1.c [for companies without completed director biographies:] Please provide the following information about your business experience during the last five years:

<table>
<thead>
<tr>
<th>Time Period by Month &amp; Year</th>
<th>Name of Employer*</th>
<th>Principal Business of Employer</th>
<th>Position(s) Held</th>
<th>Nature of Responsibilities</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

*Also list any self-employed occupations during the past five years.
1.d If you now serve, or during the last five fiscal years served, or expect to be nominated or appointed in the future as an **executive officer** or director of any publicly traded or privately held corporation or other business entity, or any registered investment company, please provide the following information:

<table>
<thead>
<tr>
<th>Name of Company</th>
<th>Public or Private?</th>
<th>*Director?</th>
<th>Compensation Committee Member?</th>
<th>Audit Committee Member?</th>
<th>Executive Officer Position(s) Held</th>
<th>Dates of Service</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

*We are required to disclose in the annual proxy statement those publicly traded companies or registered investment companies in which you currently serve or so served as director at any time during the past five years. However, the other information requested above will assist us with other disclosure requirements. [Companies listed on the NYSE must also disclose in their annual proxy statement or on the company’s website whether any audit committee member serves on the audit committees of more than 3 public companies. Note: If disclosed on or through the company website, the company must disclose that fact in proxy/Form 10-K and provide website address.]

1.e SEC rules require that our annual proxy statement disclose the specific experience, qualifications, attributes or skills that led to the conclusion that you should serve as a director of our company in light of our company’s business and structure. If material, this disclosure should cover more than the past five years, including information about your particular areas of expertise or other relevant qualifications. The SEC states that the purpose of this disclosure is to inform investors “whether and why a director or nominee is an appropriate choice for a particular company.”
Please provide below a description of your experience, qualifications, attributes or skills that led to your selection as a director or as a nominee for director:

_____________________________________________________________________

Please attach an addendum to this question 1.e if additional space is needed.

2. Your Position(s) With Our Company and Its Subsidiaries

2.a [This assumes the company will fill in this information] Please review the following information regarding our last full fiscal year that we have filled in for you:

<table>
<thead>
<tr>
<th>“X” Indicates Bodies on Which You Served</th>
<th>Date Appointed or Period Served</th>
<th>Total Meetings Held in the Last Full Fiscal Year*</th>
<th>Total Meetings You Attended</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board of Directors</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Audit Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compensation Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nominating [and Corporate Governance] Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>[List all other board committees]</td>
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</tr>
</tbody>
</table>
* This includes all regularly scheduled and special meetings, but only those meetings held during the period that you served on the designated body.

☐ I have no changes to make in the above information.

☐ I have made changes to the above information as indicated.

2.b Please describe any changes in your committee membership(s) since the end of our last full fiscal year:

____________________________________________________

2.c If you have been or will be nominated for election to our board of directors at the next annual meeting of our stockholders, do you agree to serve if elected?

☐ Yes ☐ No

2.d Is there or was there any arrangement or understanding between you and any other person or persons under which you were (or will be) selected to serve as a director?

☐ Yes ☐ No

If “yes,” please attach a copy of any written agreement or understanding, or describe the oral arrangement or understanding, and name the other person or persons:

____________________________________________________

2.e Do you have any family relationship with any other director or executive officer of our company or any subsidiary who is serving currently or so served during our last full fiscal year, or with any individual nominated or otherwise chosen for such a position with our company or any subsidiary?

For this purpose, please include any family member as defined
in Appendix B and also any aunt, uncle or first cousin family relationship.

☐ Yes  ☐ No

If “yes,” please provide each person’s identity and the nature of the family relationship:

______________________________

2.f  Do you serve as a director of any of our company’s subsidiaries?

☐ Yes  ☐ No

If “yes,” please list each subsidiary:

______________________________

2.g  Since the beginning of our last full fiscal year, did you serve our company or any of its subsidiaries in any office or other position not listed above or provide any consulting, interim or other services to our company or any of its subsidiaries outside your position on our board and (if applicable) committees of our board?

☐ Yes  ☐ No

If “yes,” please describe these other offices, positions or services:

______________________________

3. **Involvement in Legal Proceedings**

3.a  At any time during the last ten years:

- Was a petition under the federal bankruptcy laws or any state insolvency law filed by or against, or was a receiver,
fiscal agent or similar officer appointed by a court for the business or property of:

- you;
- any partnership in which you were a general partner at or within two years before the filing; or
- any corporation or business association of which you were an **executive officer** at or within two years before the filing?

- Have you been convicted in a criminal proceeding or are you the subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)?

- Have you been enjoined (even temporarily) from, or otherwise limited from:
  
  - Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of an investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with any of these activities;

  - Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of federal or state securities laws or federal commodities laws; or
Engaging in any type of business practice?

- Has any federal or state authority barred, suspended or otherwise limited for more than 60 days your right to engage in any of the activities described above in the first section of the preceding bullet point or your right to be associated with persons engaged in any of those activities?

- Has a court or the Securities and Exchange Commission found that you violated any federal or state securities law?

- Has a court or the Commodity Futures Trading Commission found that you violated any federal commodities law?

- Were you the subject of, or a party to, any Federal or State judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of: (i) any Federal or State securities or commodities law or regulation; or (ii) any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order; or (iii) any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity?

- Were you the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization (as defined in Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26))), any registered entity (as defined in Section 1(a)(29) of the Commodity Exchange Act (7 U.S.C. 1(a)(29))), or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member?
• [Has a court convicted you of fraud that has not been
overturned or expunged?]

[NOTE: Include bracketed option above for companies that are
incorporated or qualified to do business in California. This
information is needed to respond to the California “corporate
disclosure statement” that must be filed annually within 150 days
after the company’s fiscal year end.]

☐ Yes as to any items listed ☐ No as to all

If you answered “yes,” please provide details:

__________________________________________________

3.b Are you aware of any pending or contemplated legal
proceedings in which any person listed below is a party adverse,
or has a material interest adverse, to our company or any of its
subsidiaries:

• you or any other director or officer of our company or any
  of its subsidiaries;

• any other affiliate of our company;

• any owner of more than 5% of any class of our company’s
  voting securities;

• any affiliate or family member of the foregoing persons?

☐ Yes ☐ No

If you answered “yes,” please provide details:

__________________________________________________
3.c [include this if the company has not been a reporting company under the Securities Exchange Act of 1934 for at least 12 months and has been organized within the past 5 years:] To the best of your knowledge, has any promoter or control person of the company been involved in any proceeding or subject to any order of any of the types described above in this Part 3? A promoter includes a person who alone or with others participated in founding or organizing our company or who received 10% or more of our stock in connection with the founding or organizing of our company for services or property. A control person is one who directly or indirectly controls our company.

☐ Yes  ☐ No

If “yes,” please provide details of each claim and proceeding (including, if known, the date instituted, name of court or agency, principal parties thereto, factual basis and relief sought):

---------------------------------------------------------

4. Stock Ownership

4.a Do you know of any person(s) or group(s) that beneficially own more than 5% of any class of our outstanding voting securities (other than [insert names of known 5% holders])?

☐ Yes  ☐ No

If “yes,” please provide the names and addresses of each of these persons or groups:

---------------------------------------------------------

4.b How many shares of our company’s common stock do you (or your affiliates or family members) beneficially own? If none, please say so.
<table>
<thead>
<tr>
<th>Shares of which you personally are the <strong>beneficial owner</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of these shares over which you have sole voting power</td>
</tr>
<tr>
<td>Number of these shares over which you have shared voting power</td>
</tr>
<tr>
<td>Number of these shares over which you have sole investment power</td>
</tr>
<tr>
<td>Number of these shares over which you have shared investment power</td>
</tr>
<tr>
<td>Number of these shares that you have a right to acquire within 60 days after <strong>fill in the estimated date to be used in the proxy statement’s beneficial ownership table</strong> (such as by exercising stock options, warrants, or conversion or similar rights)</td>
</tr>
<tr>
<td>Shares <strong>beneficially owned</strong> by your <strong>affiliates</strong> or <strong>family members</strong></td>
</tr>
<tr>
<td>Name of individual/entity: ____________</td>
</tr>
<tr>
<td>Name of individual/entity: ____________</td>
</tr>
<tr>
<td>Name of individual/entity: ____________</td>
</tr>
<tr>
<td>Name of individual/entity: ____________</td>
</tr>
</tbody>
</table>
Please include: all director’s “qualifying shares”; shares registered in your own name; shares held in your name as trustee, executor, custodian, pledgee, agent, or nominee (alone or with others); and shares held for you by any broker, bank, or other nominee.

If you are not sure whether you or your affiliates or family members have beneficial ownership of our common stock, please contact the person named on the first page of this questionnaire.

Do you or any of your affiliates or family members have beneficial ownership of shares of any other class of our company’s equity securities?

☐ Yes   ☐ No

If “yes,” please provide equivalent ownership information for these other shares so owned:

__________________________

4.c Are there any shares that you listed in response to question 4.b that you may be deemed to beneficially own, but of which you would like to disclaim beneficial ownership?

☐ Yes   ☐ No

If “yes,” please provide the reason for disclaiming and the name of each person who should be shown as the beneficial owner of the shares in question, along with the person’s relationship to you and the number of shares that the person beneficially owns:

__________________________

4.d Are any shares of stock that you beneficially own pledged (or intended to be pledged in the future) with a lender or other third party as security for any obligations?
Please list shares subject to any form of pledge, margin loan, hypothecation, lien, or other arrangement with a lender, broker, or other third party, in which these shares serve as collateral for any of your obligations or for obligations of any other person.

☐ Yes  ☐ No

If “yes,” please specify the number of shares pledged and nature of the related transaction(s):

____________________________________________________

4.e  Do you or any of your affiliates or family members participate in investment decisions made by any corporation, partnership, limited liability company, or other business or investment entity, or by any nonprofit organization, that owns our securities?

☐ Yes  ☐ No

If “yes,” please provide details and state whether you disclaim beneficial ownership of those securities:

____________________________________________________

4.f  Have you or a family member of yours who lives in your household entered into a contract, issued an instruction or established a plan (other than under a savings or compensation plan or dividend reinvestment plan of ours) that provides for the purchase or sale of our stock in the future? (These are often called pre-arranged trading plans or Rule 10b5-1 plans.)

☐ Yes  ☐ No

4.g  Do you know of any arrangement, or believe that any arrangement exists, through which more than 5% of our stock is held or is to be held pursuant to a voting trust or other similar agreement?

☐ Yes  ☐ No
If “yes,” please provide a copy of any agreement relating to each arrangement or describe all material terms of each arrangement:

4.h Do you know of any arrangements that have already caused, or could in the future result in, a change in control of our company (other than ordinary default provisions contained in our charter, trust indentures or other governing instruments relating to our common stock)? These arrangements may include:

- a pledge by any person of equity securities;
- a deposit of equity securities as collateral;
- creation of a voting trust or similar agreement; or
- a contract providing for the sale, put, call, or other disposition of equity securities.

☐ Yes ☐ No

If “yes,” please provide the names and addresses of the parties to each arrangement and a brief description of each arrangement:

5. **Director Compensation for Our Last Full Fiscal Year**

5.a Our company has filled out information in *Appendix A* listing compensation to you from our company and its subsidiaries for our last full fiscal year, that is intended to include all plan or non-plan compensation awarded to, earned by or paid to you for all services rendered in all capacities to our company or its subsidiaries.
☐ I have no changes to make in Appendix A and confirm that I have not earned or received or been awarded any compensation with respect to the company’s last full fiscal year that is not listed in Appendix A.

☐ I have made changes to Appendix A as needed to report all compensation earned or received by me or awarded to me with respect to the company’s last full fiscal year.

5.b Are you aware of any program, plan or practice since the beginning of our last full fiscal year to:

- select option grant dates for directors, executive officers or others in coordination with the release of material non-public information (whether the information is positive or negative); or

- set the exercise price of stock options for any directors, executive officers or others on a date other than the actual grant date (excluding any express provisions of an equity compensation plan approved by our stockholders that fix or determine the exercise price in a specified manner)?

☐ Yes ☐ No

If “yes,” please provide a brief description of each program, plan or practice:

__________________________________________________________________________

5.c At any time during our last full fiscal year, did our company (whether acting through its board of directors, a board committee, its officers or otherwise):

- adjust or amend the exercise price of stock options or stock appreciation rights previously awarded to any executive officer (whether through amendment, cancellation or replacement grants or any other means) or
• otherwise modify in any way any stock options, stock appreciation rights, restricted stock awards, restricted stock units or other form of equity awards held by any **executive officer** (including but not limited to any extension of exercise periods, change of vesting or forfeiture conditions, change or elimination of applicable performance criteria, or change of the bases upon which returns are determined)?
  □ Yes □ No

If “yes,” please provide a brief description of each such adjustment, amendment or modification:

__________________________________________________

5.d  Except described elsewhere in this questionnaire, are you aware of any transaction between us (or any of our subsidiaries) and any third party, the primary purpose of which is to furnish compensation to any of our officers or directors, including yourself?
  □ Yes □ No

If “yes,” please provide details, including the monetary value of the transaction:

__________________________________________________

6.  **Related Person Transactions**

6.a Did you or any of your **family members** have, or will you or any of your **family members** have, any direct or indirect interest in any transaction since the beginning of our last full fiscal year or any currently proposed transaction in which our company or any of its subsidiaries was or is to be a participant?
Please review the instructions below before answering the above question.

☐ Yes  ☐ No

If “yes,” please describe each transaction, the amount involved in the transaction, all participants in the transaction, and the nature, value and extent of the direct or indirect interest in the transaction (please attach additional pages if needed):

____________________________________________________

You can exclude:

- Any compensation arrangement for your own services that is described elsewhere in this questionnaire;

- A transaction where your interest in the other party arises only from (x) your position as a director of a corporation that is the other party, or only from your direct and indirect ownership of less than a 10% equity interest in that corporation (or both), or (y) your direct and indirect ownership of less than a 10% equity interest as a limited partner in a partnership in which you are not a general partner and do not hold any other position.

Please consider and include, if otherwise applicable, all transactions, arrangements or relationships of any kind (including any financial transaction, any indebtedness or any guarantee of indebtedness), and any series of similar transactions, arrangements or relationships. “Indirect interests” include any interests your affiliates had or will have, and any other form of indirect interest.

Please report any of the following in which you or a family member had or has a direct or indirect interest: any loan, extension of credit, guaranty, finance, purchase, sale, lease,
license, assignment, supply, customer, service, manufacturing, or other contract, arrangement, transaction or relationship in which our company or any subsidiary is a participant. If you are an owner, principal, partner, manager, employee, or other professional service provider for any investment banking, law, accounting, consulting or other professional services firm that provides any services to our company or any of its subsidiaries, please report the details of that relationship if you have any direct or indirect interest in the service agreement or contract with our company or any subsidiary.

Please include any otherwise covered transaction in which any of your adult children or in-laws or any other family member has a direct or indirect interest, including, if applicable, any employment or service provider agreements directly between such family member and our company or any of its subsidiaries, or any situations where our company or its subsidiaries does business with or makes charitable contributions to another entity that employs or is owned or controlled by any of your family members.

6.b Please complete Appendix C, which is a list of your family members and others who may be “related persons” or “related parties” under SEC definitions and accounting standards. This is intended to help you respond to the question above, and also help us keep a list of family members and other persons that we may need to monitor for purposes of our related person transaction policy.

We would like the opportunity to assess and discuss with you the nature of any direct or indirect interest you or family members had or may have in a transaction with us for purposes of the SEC rules and accounting standards.
6.c  Are you aware of any transaction of the type described in question 6.a in which a beneficial owner of more than 5% of any class of our company’s equity securities or any family member of such a share owner had or has any direct or indirect interest?

☐ Yes  ☐ No

If “yes,” please provide details:

________________________________________________________________________

6.d  Are there any other relationships between you and us or our management that are substantially similar in nature and scope to those described in question 6.a?

☐ Yes  ☐ No

If “yes,” please provide details:

________________________________________________________________________

6.e  Are you or any affiliate or family member of yours a party to any contract with us or any of our subsidiaries that is or was to be performed in whole or in part during our last full fiscal year or our current fiscal year, which you have not described elsewhere in this questionnaire?

☐ Yes  ☐ No

If “yes,” please provide details:

________________________________________________________________________

6.f  If you have reported any transaction under questions 6.a through 6.e, was the transaction disclosed to and approved or ratified by our company’s board of directors or a committee of independent directors?

☐ Yes  ☐ No  ☐ Not applicable
6.g  If you have disclosed any transaction under questions 6.a through 6.e, and the transaction was approved or ratified by our company’s board of directors or a committee of independent directors, was there any waiver of or other deviation from otherwise applicable policies and procedures established by our company for such a transaction?
- Yes
- No
- Not applicable

6.h  Are you aware of any direct or indirect business relationship between our company or any of our company’s directors or officers, on the one hand, and our independent registered public accounting firm or any of that firm’s partners, managers or employees, on the other hand?
- Yes
- No

If “yes,” please provided details below:

7.  [FOR NYSE COMPANIES] Independence Standards for NYSE Companies

We understand that Part 6 includes broad questions that may overlap with some of the topics addressed below. However, we must nevertheless address the specific questions raised below based on the listing standards that apply to our company. In addition, Part 6 focuses on a specific SEC rule concerning related person transactions involving amounts in excess of $120,000, whereas the questions below focus on the broader topic of any relationship that might affect the independence of a non-employee director.

A majority of our board of directors must be comprised of independent directors. The questions below are designed to assist our board in making its required determination of director independence.
Also, an SEC rule requires us to disclose in our proxy statement by specific category or type, any transactions, relationships or arrangements that were considered by our board of directors in determining that a director is independent under the listing standards, even though such transactions, relationships or arrangements are not required to be disclosed under other SEC rules. This information is considered “filed” with the SEC in our proxy statement, and must be accurately reported.

A relationship described in questions 7.a through 7.e below precludes the Board of Directors from determining that the director is independent under the NYSE listing standards. The Board is also expected to assess whether any other relationship not so listed would affect a director’s independence, as covered by question 7.g.

7.a Director as employee, or family member as executive officer, of our company

Are you now, or have you been within the three years prior to the date you sign this questionnaire, employed in any capacity by our company, or

Do you have a family member who is now, or has been within the three years prior to the date you sign this questionnaire, an executive officer of our company?
☐ Yes ☐ No

7.b Director or family member receiving payments >$120,000

Have you or a family member of yours received, during any 12 month period within any of the 36 months prior to the date you sign this questionnaire, any direct compensation from our company in excess of $120,000, other than:

• compensation for board or committee service;
• pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service);

• compensation paid to a family member of yours who is a non-executive employee of our company or a parent or subsidiary of our company;

• dividend or interest income generally payable on outstanding securities;

• bona fide and documented expenses that are reimbursed? □ Yes □ No

7.c Director or family member associated with internal or external auditor

Are you, or is a family member of yours, a current partner of a firm that is our company’s internal or external auditor, or

Are you a current employee of such a firm, or

Do you have a family member who is a current employee of such a firm and who personally works on our company’s audit, or

Were you, or was a family member of yours, within the three years prior to the date you sign this questionnaire a partner or employee of such a firm who personally worked on our company’s audit within that time? □ Yes □ No

7.d Director or family member is officer of another company where our company’s officer serves on compensation committee

Are you or a family member now employed, or have you or a family member been employed within the three years prior to the date you sign this questionnaire, as an executive officer of
another company where any of our company’s present executive officers serve or served at the same time on the other company’s compensation committee?
☐ Yes ☐ No

7.e Director is employee, or has family member who is executive officer, of another company that does defined business with us

Are you a current employee, or do you have a family member who is a current executive officer, of a company that has made payments to, or received payments from, our company for property or services in an amount which, in any of the last three fiscal years of the other company, exceeds (or which, in the current fiscal year, is likely to exceed) the greater of $1 million, or 2% of the other company’s consolidated gross revenues for that respective year?
☐ Yes ☐ No

Note: For purposes of this question, you are not independent if you are currently employed by such a company, whether or not you were so employed at the time the defined business relationship existed. Contributions to tax exempt organizations are not counted as “payments.”

7.f Director is executive officer of a tax exempt organization to which our company makes large contributions

Under NYSE rules, our company must disclose in its annual proxy statement any contributions it makes to a tax exempt organization in which you serve as an executive officer, if our company has, within the preceding three years made any contributions to that organization in any single fiscal year that exceeded the greater of $1 million, or 2% of the tax exempt organization’s consolidated gross revenues.
Do you believe that your status as an executive officer of a tax exempt organization may require disclosure under these rules?  
☐ Yes  ☐ No

Please list all tax exempt organizations in which you currently serve as an executive officer:
____________________________________________________

7.g  All other direct and indirect relationships listed

Please briefly list below all existing and proposed transactions, relationships or arrangements between our company (or any of its officers) and you (other than your service on the board of directors or committees of our company and its subsidiaries).

Please list direct transactions, relationships or arrangements between the company (or any of its officers) and you, and any indirect transactions, relationships or arrangements between our company (or any of its officers) and any business, investment, nonprofit or other entity in which you are a partner, manager, director, trustee, officer, or significant stockholder or investor, or in which you have any significant financial interest.

Please consider for this purpose:

- any kind of relationship, such as commercial, industrial, banking, consulting, legal, accounting, charitable and family relationships,

- any material passive investments you own directly or through venture or hedge funds in any privately-held companies that do business with us or that we have acquired or proposed to acquire, or
• material equity ownership of any publicly traded companies with which you know our company has any significant business or other dealings.

Answer: ☐ None ☐ Other relationships are listed below:

7. [FOR NASDAQ COMPANIES] Independence Standards for NASDAQ Companies

We understand that Part 6 includes broad questions that may overlap with the topics addressed below. However, we must nevertheless address the specific questions raised below based on the listing standards that apply to our company. In addition, Part 6 focuses on a specific SEC rule concerning related person transactions involving amounts in excess of $120,000, whereas the questions below focus on the broader topic of any relationship that might affect the independence of a non-employee director.

A majority of our board of directors must be comprised of independent directors. The questions below are designed to assist our board in making its required determination of director independence.

Also, an SEC rule requires us to disclose in our proxy statement by specific category or type, any transactions, relationships or arrangements that were considered by our board of directors in determining that a director is independent under the listing standards, even though such transactions, relationships or arrangements are not required to be disclosed under other SEC rules. This information is considered “filed” with the SEC in our proxy statement, and must be accurately reported.

An “independent director” under the NASDAQ listing standards means a person other than an executive officer or employee of
the company or any other individual having a relationship which, in the opinion of our board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The listing standards set forth several categorical standards set forth below, but our board should consider any other relationship that might impair independence for this purpose.

7.a Director as employee

Are you now, or have you been within the three years prior to the date you sign this questionnaire, employed by our company or a parent or subsidiary of our company?

☐ Yes ☐ No

7.b Director or non-employee family member receiving payments >$120,000

Have you, or a family member of yours, accepted any compensation from our company or any parent or subsidiary of our company in excess of $120,000 during any period of 12 consecutive months within any of the 36 months preceding the date that you sign this questionnaire, other than:

- compensation for board or committee service;
- compensation paid to a family member of yours who is a non-executive employee of our company or a parent or subsidiary of our company; and
- benefits under a tax-qualified retirement plan or non-discretionary compensation?

☐ Yes ☐ No
7.c Director with family member who is an executive officer

Are you a family member of an individual who is now or has been at any time during the three years prior to the date you sign this questionnaire, an executive officer of our company or a parent or subsidiary of our company?
☐ Yes ☐ No

7.d Our company pays or receives defined amounts to or from other entity associated with director or director’s family member

Are you, or do you have any family member who is, a partner in, controlling stockholder or owner of, or executive officer of any organization (including any business entity or any nonprofit organizations) to which our company made, or from which our company received, payments for property or services, in the current fiscal year or any of the past 3 fiscal years, that exceed 5% of the recipient’s consolidated gross revenues for that year, or $200,000, whichever is more?
☐ Yes ☐ No

Note: You may exclude for this purpose payments arising solely from investments in our company’s securities or payments under non-discretionary charitable contribution matching programs.

7.e Director or family member is officer of another entity where our company’s officer serves on compensation committee

Are you or a family member now employed, or have you or a family member been employed within the three years prior to the date you sign this questionnaire, as an executive officer of another entity where at any time during the past three years any of our company’s executive officers now serve or served on the compensation committee of such other entity?
☐ Yes ☐ No
7.f  Director worked on our company audit as partner/employee of our auditors

Are you or a family member now a current partner of our independent auditors, or did you or a family member at any time within the three years prior to the date you sign this questionnaire, work on our company’s audit as a partner or employee of our independent auditors?

☐ Yes ☐ No

7.g  All other direct and indirect relationships listed

Please briefly list below all existing and proposed transactions, relationships or arrangements between our company (or any of its officers) and you (other than your service on the board of directors or committees of our company and its subsidiaries).

Please list direct transactions, relationships or arrangements between the company (or any of its officers) and you, and any indirect transactions, relationships or arrangements between our company (or any of its officers) and any business, investment, nonprofit or other entity in which you are a partner, manager, director, trustee, officer, or significant stockholder or investor, or in which you have any significant financial interest.

Please consider for this purpose:

- any kind of relationship, such as commercial, industrial, banking, consulting, legal, accounting, charitable and family relationships,

- any material passive investments you own directly or through venture or hedge funds in any privately-held companies that do business with us or that we have acquired or proposed to acquire, or
• material equity ownership of any publicly traded companies with which you know our company has any significant business or other dealings.

Answer: □ None □ Other relationships are listed below:

8. Audit Committee Special Questions

NOTE: Please answer questions in this Part 8 only if you are a member of or nominee for the audit committee of our board of directors. If not, please skip to Part 9.

8.a Director is beneficial owner of more than 10% of our company’s voting power

Do you directly or indirectly beneficially own more than 10% of any class of our company’s equity securities? □ Yes □ No

Note: Under SEC rules, ownership of 10% or less of the outstanding voting stock is presumed not to create affiliate status. If ownership exceeds 10%, our company may or may not determine that such ownership creates affiliate status depending on the facts and circumstances, under SEC rules.

8.b Director is affiliate

Are you an affiliate of our company or any subsidiary of our company, other than in your capacity as a member of the board of directors or any committee of the board of directors of our company and/or our direct or indirect subsidiaries? □ Yes □ No
8.c  **Subsidiary positions**

Are you serving as a director of any of our direct or indirect majority-owned consolidated subsidiaries?

☐ Yes  ☐ No

If yes, please list each such subsidiary and all positions that you hold with that subsidiary:

____________________________________________________

*Note: Subsidiary directorships do not necessarily preclude committee membership, as long as you do not receive compensation from the company or its subsidiaries other than ordinary course compensation for board and committee service.*

8.d  **Director receives any direct compensatory fees from our company**

Are you a party to any existing or proposed contract or other written or oral arrangement which provides for payments to you from our company or any of its subsidiaries of any consulting, advisory or other compensatory fee, other than compensation for your service as a member of our board of directors or of any committee of our board of directors (or boards or board committees of our subsidiaries)?

☐ Yes  ☐ No

8.e  **Family receives compensatory fees**

Is any spouse, minor child or stepchild of yours, or any child or stepchild of yours sharing a home with you, a party to any existing or proposed contract or other written or oral arrangement which provides for payments to that individual of any consulting, advisory or other compensatory fee from our company or any of our subsidiaries?

☐ Yes  ☐ No
8.f Associated entity receives compensatory fees

Is any entity (i) in which you are a partner, member, managing director, executive officer, or principal or in which you occupy a similar position, and (ii) which provides accounting, consulting, legal, investment banking, financial advisory or any similar services, a party to any existing or proposed contract or other written or oral arrangement which provides for payments to that entity of any consulting, advisory or other compensatory fee from our company or any of our subsidiaries?

☐ Yes  ☐ No

8.g Participation in financial statements preparation in past three years [this is a NASDAQ standard only]

Have you participated (other than as a director reviewing the same) in the preparation of the financial statements of our company or any current subsidiary of our company at any time during the past three years?

☐ Yes  ☐ No

8.h General financial literacy (from listing standards; all members must be able to say “yes”)

Are you able to read and understand fundamental financial statements, including a company’s balance sheet, income statement, and cash flow statement?

☐ Yes  ☐ No

8.i Finance experience standard (from listing standards; at least one member must say “yes”)

[FOR NYSE COMPANIES:] Do you have accounting or related financial management expertise?

[FOR NASDAQ COMPANIES:] Do you have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable
experience or background which results in your financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities?

☐ Yes  ☐ No

8.j Audit committee financial expert (from SEC rules; we must disclose whether at least one member meets this standard) (you do not need to answer this series of questions unless you wish to be listed as an audit committee financial expert):

(1) Do you have each of the following measures of financial expertise (to qualify, each item must be “yes”):

- an understanding of US generally accepted accounting principles and financial statements;

  ☐ Yes  ☐ No

- the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

  ☐ Yes  ☐ No

- experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by our company’s financial statements, or experience actively supervising one or more persons engaged in such activities;

  ☐ Yes  ☐ No

- an understanding of internal control over financial reporting; and

  ☐ Yes  ☐ No
• an understanding of audit committee functions.
  □ Yes  □ No

(2) Have you acquired the above financial expertise through one or more of the following outside and/or prior to serving on our audit committee (to qualify, you must meet at least one of the following criteria):

(If you have previously been qualified by our board to serve as an audit committee financial expert, please indicate in the next 4 blanks “previously provided.”)

• Do you have education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions?
  □ Yes  □ No

If “Yes,” please list applicable education and experience:
___________________________________________

• Do you have experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions?
  □ Yes  □ No

If “Yes,” please list applicable supervisory positions:
___________________________________________

• Do you have experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation
of financial statements?
☐ Yes ☐ No

If “Yes,” please list applicable oversight or assessment positions:
_______________________________________________

• Do you have other relevant experience that you believe is equivalent to the experience listed in any of the three bullet points above?
☐ Yes ☐ No

If “Yes,” please describe the relevant experience:
_______________________________________________

Note: If you seek to qualify as an audit committee financial expert under this last bullet point, then our annual proxy statement must disclose the relevant experience that is the basis for concluding that you are such an expert.

9. Compensation Committee Special Questions

NOTE: Please answer questions in this Part 9 only if you are a member of or nominee for the compensation committee of our board of directors. If not, please skip to Part 10.

9.a Performance-based compensation is not subject to the limit on deductibility of certain officer compensation under Section 162(m) of the federal tax code if, among many other conditions, the compensatory arrangement is approved by a committee of “outside directors” as defined in the tax regulations. SEC Rule 16b-3 also provides exemptive relief from the Section 16(b) short swing profit recovery rule for transactions under equity plans administered by a committee of two or more “non-employee directors.”
We intend our compensation committee members to meet the requirements of these definitions. The questions below cover portions of these definitions not specifically covered by other questions above. If you answer “yes” to any questions below, or if there are transactions reported under Part 6 or if certain facts are indicated in Part 7, we will review this matter further, and this may preclude you from being considered an outside director or non-employee director under the above rules.

(1) Are you a former employee (at any time) of our company receiving compensation from our company for past services (other than tax-qualified retirement plan benefits)?

☐ Yes ☐ No

(2) Have you at any time in the past been an officer of our company?

☐ Yes ☐ No

(3) Either:

• Do you receive or have you received from our company, in our company’s current or previous taxable year, any direct or indirect payments, or is our company now contractually obligated to pay you directly or indirectly, for goods or services in any capacity other than as a director?

or

• Does our company make or has our company made in our company’s current or previous taxable year, or is our company now contractually obligated to make, any payments for goods or services to any business, professional or other entity (A) that employs you, (B) to which you render any substantial services, or
(C) in which you have at least a 5% ownership interest?
☐ Yes    ☐ No

Note: These questions cover only part of a complex remuneration test of the income tax regulations under Section 162(m), and a “yes” answer above should be explained below and reviewed with our company’s legal counsel to determine the appropriate result under Treas. Reg. Section 1.162-27(e)(3). There are “de minimis” and timing exceptions that may or may not permit service on the committee depending on a legal analysis of the applicable facts (including your percentage ownership of an entity, amount of payments, amount of gross revenues of the entity, timing and other factors).

(4) Do you receive more than $120,000 of compensation directly or indirectly from our company or any parent or subsidiary for services other than as a director?
☐ Yes    ☐ No

9.b The company must now comply with the new independence standards for compensation committee members; therefore, we are asking that directors on the compensation committee and director nominees for compensation committee membership respond to the following questions so that we may gather the appropriate data to make the additional independence assessment for committee membership.

[FOR BOTH NYSE AND NASDAQ COMPANIES:]¹ Each member of the company’s compensation committee and

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nominees for membership to the committee must be independent under the existing criteria for director independence noted above in Part 7. In addition, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the company which is material to that director’s ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to: (1) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the company to such director; and (2) whether such director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company.  

For purposes of the questions in this Part 9.b, you are affiliated with a person if you directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, that person. You are also considered an affiliated person if you are, among other things, an executive officer, general partner or managing member of an affiliate, or a director who is also an employee of an affiliate. You are not deemed to control a person if you are not the beneficial owner, directly or indirectly, of more than 10% of any class of voting equity securities of the person and you are not an executive officer of the person.

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5 NASDAQ commentary provides that “[f]or purposes of the additional independence test for compensation committee members described in Rule 5605(d)(2)(A), any reference to the “Company” includes any parent or subsidiary of the Company. The term “parent or subsidiary” is intended to cover entities the Company controls and consolidates with the Company’s financial statements as filed with the Commission (but not if the Company reflects such entity solely as an investment in its financial statements).” This is consistent with the approach reflected in NASDAQ’s existing rules on director independence.

6 Commentary to NYSE Listed Company Manual §303A.02(a) provides that “when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the board should consider whether the affiliate relationship fees by compensation committee members in the independence determination.
(1) Did you in the past fiscal year, or do you currently or plan in the future to, accept directly or indirectly any consulting, advisory or other compensatory fee from the company or any of its subsidiaries?7

By way of example, “indirect” includes acceptance of such a fee by a spouse, a minor child or stepchild or a child or stepchild sharing a home with you or by an entity in which places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company’s executive compensation.”

Commentary to the NASDAQ rules provides that “when considering any affiliate relationship a director has with the Company, a subsidiary of the Company, or an affiliate of a subsidiary of the Company, in determining independence for purposes of compensation committee service, the board should consider whether the affiliate relationship places the director under the direct or indirect control of the Company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair the director’s ability to make independent judgments about the Company’s executive compensation. In that regard, while a board may conclude differently with respect to individual facts and circumstances, NASDAQ does not believe that ownership of Company stock by itself, or possession of a controlling interest through ownership of Company stock by itself, precludes a board finding that it is appropriate for a director to serve on the compensation committee. In fact, it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.”

7 See footnote 4 above; NASDAQ has stated that the board must consider board and committee fees and retirement plan compensation when affirmatively determining the independence of compensation committee members.

NYSE commentary to the final listing standards adopted January 11, 2013 provides the following: “…as all non-management directors of a listed company are eligible to receive the same fees for service as a director or board committee member, NYSE does not believe that it is likely that director compensation would be a relevant consideration for compensation committee independence. NYSE noted that, however, the proposed rules require the board to consider all relevant factors in making compensation committee independence determinations. Therefore, NYSE believes that, to the extent that excessive board compensation might affect a director’s independence, the proposed rules would require the board to consider that factor in its determination.” See http://www.sec.gov/rules/sro/nyse/2013/34-68639.pdf at pages 22-24.

To avoid restatement of board/committee compensation that is elsewhere in this questionnaire, you may wish to add a reference to this question such as: “For your convenience in answering this question, Appendix A lists the compensation to you from our company for our last full fiscal year.”
you are a partner, member, an officer such as a managing
director occupying a comparable position or **executive
officer**, or occupy a similar position (except limited
partners, non-managing members and those occupying
similar positions who, in each case, have no active role in
providing services to the entity) and which provides
accounting, consulting, legal, investment banking or
financial advisory services to the company or any of its
subsidiaries.

☐ Yes  ☐ No

If yes, please describe the nature of the services provided
and the fee obtained/to be obtained:

________________________________________________________________________

(2) The board of directors of the company must consider your
sources of compensation in determining your
independence and eligibility to serve as a member of the
compensation committee. This includes consideration of
whether you receive compensation from any person or
entity that would impair your ability to make independent
judgments about the company’s executive compensation.
For this purpose, please identify the sources of your
compensation (other than any compensation identified in
the question above). **Please note that this does not require
you to identify the amounts paid in compensation.**

________________________________________________________________________

(3) Other than in your capacity as a member of the
compensation committee, the board of directors or any
other committee of the board of directors, are you
“affiliated” (as defined above) with the company or any of
the company’s subsidiaries or any affiliate of the company’s subsidiaries?

☐ Yes  ☐ No

If yes, please describe your affiliation:

____________________________________________

(4) Do you have any other relationship with the company, any of its subsidiaries or affiliates of its subsidiaries (other than in your capacity as a member of the compensation committee, the board of directors or any other committee of the board of directors), or are there any circumstances that are relevant to the board of directors’ determination of whether you have a relationship to the company that is material to your ability to be independent from management in connection with the duties of a member of the compensation committee or which would impair your ability to make independent judgments about the company’s executive compensation?

☐ Yes  ☐ No

If yes, please describe the relationship or circumstances:

____________________________________________
10. Relationships with Compensation Consultants

Appendix D to this questionnaire lists each individual at each compensation consultant that is providing or provided executive or director compensation consulting services to us during our last completed fiscal year.

Do you have or did you have during the last completed fiscal year any business or personal relationship with [insert name of compensation consultant(s)] or any of the individuals identified on Appendix D? For purposes of this question, “business or personal relationships” include, among other things, familial relationships, employment, business partnerships and other commercial relationships.

☐ Yes  ☐ No

If “yes,” please provide the following information:

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8 In 2012, the SEC adopted new disclosure requirements regarding compensation consultants and conflicts of interest. Companies are required to disclose any conflicts of interest with regard to any compensation consultant providing, or that provided during the company’s last completed fiscal year, services that involve determining or recommending the amount or form of executive and director compensation other than when such consulting services are limited to consulting on any broad-based plan that is generally available to all salaried employees and which plan’s terms do not discriminate in favor of executive officers or directors of the company. Companies must comply with the SEC’s new disclosure requirements in any proxy or information statement for an annual meeting of stockholders (or special meeting in lieu of an annual meeting) at which directors will be elected occurring on or after January 1, 2013. This section is designed to assist in obtaining information about whether a conflict exists that must be disclosed in the company’s proxy statement. It may also assist in assessing the independence of advisers to the compensation committee, which became required as of July 1, 2013.
11. **Section 16 Filing Requirements**[^9] [Delete if Separate Memo is Used]

11.a Except as described below, I represent to the company that:

- I have timely filed all Forms 3, 4 and 5 with the Securities and Exchange Commission required to be filed during our company’s last full fiscal year to report my beneficial ownership and changes in my beneficial ownership of the company’s common stock; and

[^9]: Insider trading enforcement continues to be a top priority of the SEC. In September 2014, the SEC announced (http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678) charges against 28 officers, directors or major stockholders for failing to promptly report information about their holdings and transactions in company stock. Six public companies were also charged for contributing to filing failures by insiders or failing to report their insiders filing delinquencies. SEC enforcement staff used quantitative data sources and ranking algorithms to identify these insiders as repeatedly filing late. It is unusual for the SEC to bring so many actions at once; the SEC continues to send a clear signal to insiders that the reporting requirements under the federal securities laws are not just suggestions but are legal obligations to be followed. For public companies that voluntarily assist insiders in complying with these filing requirements, the SEC’s enforcement actions make it clear that failure to comply with this voluntary responsibility carries with it serious consequences.
• I am not required to file a Form 5 with respect to the company’s last full fiscal year.

Please indicate below that there are no exceptions necessary to make the above statements accurate, or, if there are exceptions, describe those exceptions in reasonable detail by attaching a copy of the Form 5 reporting the required transactions or by listing transactions and/or forms not filed or filed late.

☐ No exceptions. ☐ Describe exceptions:

________________________________________________________________________

I acknowledge that the Company will rely on the statements above for purposes of making any required disclosure of delinquent Forms 3, 4, or 5 filings in its SEC filings.

A Form 5 is required to report:

• any holdings or transactions which were exempt from reporting on Form 4 and which were not voluntarily reported on Forms 4 previously (such as gifts and inheritances, and certain fund switch transactions involving our company’s stock (if any) under 401(k) or other tax-qualified plans);

• any holdings or transactions that should have been reported during the most recently completed fiscal year but have not been reported; and

• as to the first Form 5 requirement for a reporting person, any holdings or transactions that should have been reported during the most recently completed two fiscal years, but were not reported before the Form 5 due date.

Certain transactions under a qualified employee stock purchase plan and ongoing acquisitions of our company stock (if any)
under 401(k) plans (other than by the change in investment of existing plan funds) are exempt from reporting altogether (subject to updating total holdings in forms otherwise required to be filed).

If you have any questions regarding whether you are required to file a Form 5 for our last full fiscal year, please call the person named on the first page of this questionnaire.

12. **Iran Threat Reduction and Syria Human Rights Act**

[Optional Section—Given the nature and subject matter of certain questions contained in this section, the company may prefer to verbally discuss and monitor periodically these matters with directors rather than including them in this questionnaire.]^{10}

For purposes of this Part 12, you are an “affiliate” of a person if you directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, that person. Also, generally, for purposes of this Part 12, the company is not required to report on the activities of another entity where the only relationship between the company and the

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^{10} In 2012, President Obama signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) which represents a significant expansion of US sanctions targeting Iran because, among other things, it (i) subjects non-US entities owned or controlled by US entities to the Iranian Transactions Regulations and makes US parent companies liable for any violations, (ii) requires publicly traded companies engaging in certain types of Iran-related business to publicly disclose such business to the SEC, and (iii) significantly expands the petroleum-related sanctions in the Iran Sanctions Act. The ITRA requires companies subject to the reporting requirements of Section 13(a) of the Exchange Act to publicly disclose specific information about certain Iran-related activities in annual and quarterly reports filed with the SEC for reports due on or after February 6, 2013. Because directors may be deemed affiliates under this reporting requirement, the questions included in this section address this subject matter for the most recent fiscal year and the Declaration and Signature page includes a provision that the director will update the company if any answers to these questions change throughout the next fiscal year’s quarterly periods since the reporting requirements cover quarterly periods as well. The company may prefer to instead discuss and monitor periodically with each director, or particular directors, the subject matter contained in these questions.
other entity is that you also serve as an outside director to that entity. To your knowledge, during the last fiscal year:

12.a Have you or any of your affiliates knowingly engaged in any activities or transactions relating or contributing to Iran’s petroleum or petroleum products industries or Iran’s ability to acquire or develop weapons of mass destruction, conventional weapons or other military capabilities?

☐ Yes  ☐ No

12.b Have you or any of your affiliates knowingly engaged in: any activities or transactions that finance or facilitate the Iranian government’s acquisition or development of weapons of mass destruction or that may support or facilitate terrorism; any transactions with an Iranian financial institution to finance or otherwise support Iran’s ability to acquire or develop weapons of destruction or international terrorism; or any activities or transactions with or that finance or otherwise benefit Iran’s Islamic Revolutionary Guard Corps?

☐ Yes  ☐ No

12.c Have you or any of your affiliates knowingly engaged in: any transfers of products or technology or provision of services to Iran that are likely to be used by the Iranian government for human rights abuses against the Iranian people; or any transfers of technology that could be used by the Iranian government to restrict the free flow of unbiased information in Iran or disrupt, monitor or otherwise restrict speech of the Iranian people?

☐ Yes  ☐ No

12.d Have you or any of your affiliates knowingly engaged in or conducted any transactions with the Iranian government or any political subdivision or agency or any entity owned or controlled by the Iranian government without authorization from a US
federal department or agency or with any persons or entities whose assets are frozen pursuant to executive orders for their involvement with weapons of mass destruction or terrorism?

☐ Yes   ☐ No

If you answered yes to any of the questions above, please provide further details of each such transaction or activity:

__________________________________________________

__________________________________________________

13. Foreign Corrupt Practices Act [Optional Section]

In this section:

- Each question applies to activities or conduct inside and outside the United States of America.

- The terms “payments” and “contributions” include cash, hard goods, services, use of property and anything else of value.

- Include acts done through intermediaries, such as payments to sales agents or representatives that are passed on in whole or in part to purchasers, or compensation or reimbursement to persons in consideration for their acts.

- Please include all matters that you have a reasonable basis to believe occurred (that is, any matters of which you have direct personal knowledge, as well as matters that you may not be certain occurred from your own direct or personal knowledge but as to which you know of credible evidence indicating that the matter may have occurred).
13.a Do you believe that our company, its subsidiaries, or any directors, officers, employees, agents, consultants, sales representatives or others acting on behalf of or for the benefit of our company or its subsidiaries, have engaged at any time in:

- Any bribes or kickbacks to government officials or their relatives, or any other payments to such persons, whether or not legal, to obtain or retain business or to receive favorable treatment with regard to business?
  
  □ Yes □ No

- Any bribes or kickbacks to persons other than government officials, or to relatives of such persons, or any other payments (whether or not legal) to such persons or their relatives to obtain or retain business or to receive favorable treatment with regard to business?
  
  □ Yes □ No

- Any contributions, whether or not legal, made to any political party, political candidate or holder of governmental office?
  
  □ Yes □ No

- Any bank accounts, funds or pools of funds created or maintained without being accurately recorded or identified in our books and records, or as to which the receipts and disbursements from these accounts have not been accurately recorded or identified in our books and records?
  
  □ Yes □ No
- Any receipts or disbursements, the actual nature of which has been “disguised,” hidden or otherwise not fully documented in our books and records?
  - Yes  - No

- Any fees paid to consultants or commercial agents that exceeded the reasonable value of the services purported to have been rendered?
  - Yes  - No

- Any payments or reimbursements made to our personnel for the purposes of enabling them to do anything referred to under this Part 13?
  - Yes  - No

If you answered “yes” to any of these questions, please provide details:

______________________________________________________________________________________________
Declaration and Signature

I understand that my answers will be used in the preparation of one or more documents to be filed by our company with the Securities and Exchange Commission.

If, at any time before [insert date], any of my answers to this questionnaire or the information I am providing becomes incorrect (for example, due to the passage of time, as a result of subsequent developments or because I realize that I provided an incorrect response), then I will promptly furnish to the person named on the first page of this questionnaire any necessary or appropriate correcting information. Otherwise, the above information continues to be, to the best of my knowledge, complete and correct.

[Additionally, I understand that the Iran Threat Reduction and Syria Human Rights Act of 2012 requires the company to publicly disclose specific information about relevant Iran-related activities in its annual and quarterly reports filed with the SEC. I will promptly notify the person named on the first page of this questionnaire if my answers to the questions contained in Part 12 of this questionnaire require updating throughout the quarterly periods in the company’s next fiscal year.]¹¹

Date: ____________, 20___

Signature: ____________________

Name: ____________________

¹¹ Consider including this declaration only if you include the questions in Part 12 to help ensure that non-employee directors understand the reporting requirements under the Iran Threat Reduction and Syria Human Rights Act of 2012 are both quarterly and annually. If the company prefers not to include this declaration, consider polling or discussing these matters with the non-employee directors on a quarterly basis.
Appendix A

Director Compensation Summary

[edit as appropriate to your company’s compensation structure]

Set forth below is a summary of compensation, based on our company’s records, that was awarded to, earned by, or paid to you for all services rendered in all capacities for our company’s fiscal year ended __________, 20____. Please correct any information below that is incomplete or inaccurate in any way. Under SEC rules, “incentive” awards are equity or non-equity awards earned upon achieving a performance measure over a specified period (whether based on financial, stock price or other performance). Amounts deferred under a 401(k) plan or other deferred compensation plan are not deducted from categories below.

Summary of Fiscal Year _____ Compensation for Director: [Name]

<table>
<thead>
<tr>
<th>Category of Compensation</th>
<th>Amount ($ or # of shs)</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Director annual cash retainer</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Director cash fees per board meeting attended</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Director cash fees per committee meeting attended</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Committee chair cash fees</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Other cash fees for director service [describe]</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>
Summary of Fiscal Year ____ Compensation for Director: [Name]

<table>
<thead>
<tr>
<th>Category of Compensation</th>
<th>Amount ($ or # of shs)</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stock awards:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• [RSUs granted on ______<strong>, 20</strong>:] [incentive/time vesting]</td>
<td>_______ shs *</td>
<td></td>
</tr>
<tr>
<td>• [Restricted stock granted on _____<strong>, 20</strong>:] [incentive/time vesting]</td>
<td>_______ shs *</td>
<td></td>
</tr>
<tr>
<td>Option awards and stock appreciation rights:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Options granted on ______<strong>, 20</strong>:] [incentive/time vesting]</td>
<td>_______ shs *</td>
<td></td>
</tr>
<tr>
<td>• Stock appreciation rights granted on ______<strong>, 20</strong>:] [incentive/time vesting]</td>
<td>_______ shs *</td>
<td></td>
</tr>
<tr>
<td>Non-equity incentive plan compensation</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>earned in or for the fiscal year under performance criteria, whether or not paid out during the year</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Awards granted under non-equity incentive compensation plan</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Aggregate change in the actuarial present value of any accumulated benefit under all defined benefit and actuarial pension plans (including supplemental plans) and above-market or preferential earnings on deferred compensation that is not tax-qualified</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>All other compensation (total:__________):</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Category of Compensation</td>
<td>Amount ($ or # of shs)</td>
<td>Not Applicable</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------------------</td>
<td>------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>Perquisites and other personal benefits (see sub-table below)</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>All “gross ups” or other amounts reimbursed during the last full fiscal year for the payment of taxes</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Securities you purchased from our company or its subsidiaries at a discount (unless the discount is generally available to all security holders or salaried employees)</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Any amount paid or accrued to you under a plan or arrangement in connection with the resignation, retirement, severance or constructive termination (including a change in responsibilities) or other termination of your relationship with our company or a change in control of our company</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Our company’s contributions or other allocations to vested and unvested defined contribution plans (e.g., 401(k) plans)</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Consulting fees earned from, or paid or payable by our company or its subsidiaries or any of their joint ventures</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs (including any programs under</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>
# Summary of Fiscal Year _____ Compensation for Director: [Name]

<table>
<thead>
<tr>
<th>Category of Compensation</th>
<th>Amount ($ or # of shs)</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>which our company agrees to make donations to one or more charitable institutions in a director’s name, whether payable currently or upon any future event)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The dollar value of any insurance premiums paid by, or on behalf of, our company during the last full fiscal year with respect to life insurance for you</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant fair value required to be reported for the stock or option awards listed above</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Any other plan or non-plan compensation awarded to, earned by or paid to you for all services rendered in all capacities to our company or its subsidiaries, including any transaction between our company and a third party where any purpose of the transaction is to furnish compensation to you</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>

* Although we must report the dollar value of equity awards in the proxy statement, we are confirming here only the number of shares under equity awards granted and will compute and include the applicable dollar value in the draft proxy statement to be circulated.
Guidance on evaluating perquisites:

SEC rules impose specific requirements for identifying and disclosing perquisites and personal benefits for directors. We have endeavored to list a total perquisite and personal benefit amount above (if applicable) based on our company’s records. However, we need you to review the following details and help assure that we have accurately recorded these amounts. Please edit the following chart for this purpose as needed to provide an accurate summary of perquisites or personal benefits received, with an “X” in each category that is not applicable.

Generally, a perquisite is a benefit to you that (1) is not integrally and directly related to your duties as a director, and (2) confers a direct or indirect benefit that has a personal aspect. Tax treatment has no bearing on this analysis.

Typically, perquisites do not include paid travel to and from business or directors’ meetings, other business travel, business entertainment, security during business travel, and itemized expense accounts the use of which is limited to business purposes.

**Perquisite Analysis for Director [insert name] for Fiscal Year ___**

<table>
<thead>
<tr>
<th>Personal (non-business) use or benefit paid or provided by our company or any of its subsidiaries in the form of:</th>
<th>Amount</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Club use/fees/dues not exclusively used for business entertainment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commuting expenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased motor vehicle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased airplane</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Perquisite Analysis for Director [insert name] for Fiscal Year ___

<table>
<thead>
<tr>
<th>Personal (non-business) use or benefit paid or provided by our company or any of its subsidiaries in the form of:</th>
<th>Amount</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company owned or leased watercraft</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased lodging or other real estate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company owned or leased personal property or company-paid service (computer, PDA, cell phone, etc.) for personal use</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discounts on company or third party products or services (not generally available)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entertainment events not for business purposes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial, tax, legal, investment or other professional services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Housing, home repair, maintenance or improvement, home office, or similar expenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Meals not for business purposes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal vacation or other personal travel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Relocation assistance or payments that permit you to continue living at your residence</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Perquisite Analysis for Director [insert name] for Fiscal Year ___

Personal (non-business) use or benefit paid or provided by our company or any of its subsidiaries in the form of:  

<table>
<thead>
<tr>
<th>Amount</th>
<th>Not Applicable</th>
</tr>
</thead>
</table>

Secretarial services or other use of company employees for personal matters

Security services at your residence or for personal travel

Travel, lodging, entertainment, meal or other personal expenses for any family member or personal friends to accompany you on travel for director meetings, other company business or tours, or for non-business personal travel
Appendix B

Definitions

For purposes of this questionnaire, unless otherwise indicated in the particular section of the questionnaire:

“affiliate” of a specified person means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the specified person.

For purposes of this questionnaire, you should assume that any corporation, other entity, or trust or estate is an affiliate of yours if you are an executive officer, manager or similar controlling person, or trustee or executor of the trust or estate, or the direct or indirect beneficial owner of more than 10% of any class of equity securities of the entity, or if you otherwise in fact control the entity.

A person will be deemed not to be in control of a corporation for this purpose if the person:

- is not the beneficial owner, directly or indirectly, of more than 10% of any class of equity securities of the other person;
- is not an executive officer of the other person; and
- is not a director of the other person.

Similar principles would apply by analogy to partnerships, trusts, estates or other entities.

A director, executive officer, partner, member, principal or designee of an affiliate of another person will also be deemed to be an affiliate of that other person.

“amount” or “amount involved” means the dollar value of the amount involved in the transaction or a series of transactions, without
regard to profit or loss on the transaction, including (i) the aggregate amount of periodic payments or installments due on or after the beginning of our last full fiscal year including any required or optional payments due at the end of the transaction, and (ii) in the case of indebtedness, the highest amount of aggregate outstanding principal indebtedness since the beginning of our last full fiscal year, plus interest payable on it during the fiscal year.

“beneficial ownership” of a security means a person’s ability, directly or indirectly through any contract, arrangement, understanding, relationship or otherwise, to exercise alone or together with others:

- voting power, which includes the power to vote, or to direct the voting of, a security; or

- investment power, which includes the power to dispose, or to direct the disposition, of a security.

This term also includes having the right to acquire beneficial ownership of a security within 60 days, including any right to acquire the security through the exercise of any option, warrant or right, through the conversion of a security, pursuant to the power to revoke a trust, discretionary account or similar arrangement or pursuant to the automatic termination of a trust, discretionary account or similar arrangement.

“control” means the possession, directly or indirectly, of the power to cause the direction of the management and policies of a person, whether through the ownership of securities, by contract or otherwise. An executive officer or director of a company generally is considered to control that company. If you are in doubt as to the meaning of control in a particular context, you may wish to consult with counsel.
“executive officer” means a company’s chairman,\textsuperscript{1} vice chairman,\textsuperscript{1} president, principal financial officer, principal accounting officer any vice president in charge of a principal business unit, division or function (such as marketing, administration or finance), any other officer who performs a policy-making function or any other person who performs similar policy-making functions. Executive officers of subsidiaries may be deemed executive officers of the parent company if they perform these sorts of policy-making functions for the parent company.

“family member” of a person means the person’s spouse, and each parent, stepparent, child, stepchild, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of the person, and anyone (other than a tenant or employee) who resides in the person’s home and any other family member who might control or influence you, or who might be controlled or influenced by you, because of the family relationship. This includes the listed family members whether they are minors or adults, and whether or not adopted.

\textsuperscript{1} Including these positions is optional; whether each of these positions is considered to be an “executive officer” position is fact specific to each company.
# Appendix C

## RELATED PERSON TABLE FOR: [NAME]  

<table>
<thead>
<tr>
<th>Name</th>
<th>Name of corporation, partnership, trust, or other entity in which named person beneficially owns more than 1% of any class of equity security or other class of ownership interest (Please include approximate% of ownership interest)</th>
<th>Name of corporation, partnership, trust, or other entity in which named person is an executive officer, general partner, or manager, or has a similar role (Please include title/role of named person in entity)</th>
</tr>
</thead>
<tbody>
<tr>
<td>You</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Children and stepchildren:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parents and stepparents:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Your spouse:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Your sisters and brothers:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Your mothers-in-law and fathers-in-law:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Your daughters-in-law and sons-in-law:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Your sisters-in-law and brothers-in-law:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any person sharing your household (other than a tenant or employee):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any family member (other than those listed above) who might control or influence you, or who might be controlled or influenced by you, because of the family relationship (ASC 850-10)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix D

Compensation Consultants

[For each individual at [name of compensation consultant] providing executive or director compensation consulting services, provide name and title below.]

[Insert name of compensation consultant]

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
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<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Sample Audit Committee Resolutions

This sample of audit committee resolutions is current only as of October 2015 and is for informational purposes only and may not be relied upon as legal advice.

[Company, Inc.]

Audit Committee Meeting Held on __________, 20__

Upon due notice, a meeting of the Audit Committee (the “Committee”) of the Board of Directors of [COMPANY, Inc.] (the “Company”) was held on __________ at the offices of the Company in ________________, [State]. __________, ______________ and ____________, constituting the entire Committee, were present in person or participating by telephone conference call in which all persons present at the meeting could hear each other. Also in attendance in person or by conference call were ______________ and ______________ (the “auditor representatives”), on behalf of the Company’s independent registered public accounting firm [AUDITORS LLP], and [____________, Chief Financial Officer, and __________, Executive Vice President Finance].

Prior to the meeting, the Company circulated to the members of the Committee the following agenda and documentation: [list].

Prior to the meeting, the Company also circulated to the members of the Committee a draft proxy statement (the “Proxy Statement”) for the annual shareholders meeting scheduled for ______________ (with notice of meeting and form of proxy [as well as Notice of Internet Availability of Proxy Materials] ), and a draft Annual Report on Form 10-K for the fiscal year ended ______________ (the “10-K”).

The Proxy Statement includes:

- the proposed text of the report of the Committee which SEC rules require to be included in the annual meeting proxy statement above the name of each member of the Committee;
• [if applicable: a copy of the proposed amended and restated Audit Committee Charter to be adopted by the Company’s Board of Directors (which is required to be included as an appendix to the annual meeting proxy statement at least once every 3 years, unless such charter is available on the Company’s Website and such information is disclosed in the Company’s proxy statement in compliance with Item 407);] and

• a description of the Audit Fees, Audit-Related Fees, Tax Fees and All Other Fees for the past two fiscal years paid to [AUDITORS LLP] required to be disclosed under Item 9(e) of the SEC’s proxy rules.

___________________ served as Chairperson of the meeting, and
_________________ served as Secretary of the meeting. [On motion duly made, seconded and unanimously approved, the minutes of the ____________, 20___, meeting were approved.]

Auditor Independence Report and Dialogue

The [AUDITORS LLP] representatives presented to the Committee the written disclosures and letter from [AUDITORS LLP] required by applicable accounting rules. The Committee discussed with the [AUDITORS LLP] representatives the independence of [AUDITORS LLP] from the Company and its subsidiaries and any other related entities (if any), and received confirmation from the [AUDITORS LLP] representatives that there have been no relationships or circumstances with or involving the Company or its subsidiaries or related entities that would impair the objectivity and independence of [AUDITORS LLP] under applicable SEC rules.

The Committee and [AUDITORS LLP] included within their independence dialogue an overall review of whether [AUDITORS LLP] are capable of exercising objective and impartial judgment on all issues encompassed within their audit engagement. The Committee reviewed the fees paid to [AUDITORS LLP] during the past two fiscal years, as set forth in the Proxy Statement, and evaluated whether
the amounts and categories of those fees affected the independence of [AUDITORS LLP]. [AUDITORS LLP] also reported the following under SEC Regulation S-X Rule 2-01:

- the absence of investment, employment and business relationships that would impair the independence of [AUDITORS LLP], the absence of any arrangements calling for payment of any kind of contingent fee or commission by the Company or its subsidiaries to [AUDITORS LLP], and the absence of any compensation to any audit partner for procuring engagements for products or services other than audit, review or attest services to the Company, as further described in Regulation S-X Rule 2-01(c)(1, 2, 3, 5 and 8);

- confirmation from [AUDITORS LLP] that they have complied with the partner rotation and related requirements of Regulation S-X Rule 2-01(c)(6);

- confirmation from [AUDITORS LLP] that they performed no non-audit services for the Company or its controlled subsidiaries or (if any) material equity method subsidiaries that are prohibited in Regulation S-X Rule 2-01(c)(4); and

- confirmation from [AUDITORS LLP] that they provided no services to the Company or its subsidiaries that were not first approved by the Committee in accordance with Regulation S-X Rule 2-01(c)(7).

**Discussion of Audit and Other Required Communications Related to the Audit**

The [AUDITORS LLP] representatives then summarized the audit completed by [AUDITORS LLP] for the fiscal year ended ______________, and answered questions of the Committee regarding the audit. The Committee discussed with the [AUDITORS LLP] representatives the matters required to be discussed by applicable accounting rules concerning the audit, including but not
limited to confirmation that [AUDITORS LLP] had communicated and discussed with the Committee the matters required under Auditing Standard No. 16 (AS16), *Communications with Audit Committees*,\(^1\) [and presented for review and discussion with the Committee [AUDITORS LLP]'s letter dated __________, 20___ relating to these matters and summary of fees paid to them,]\(^2\) and, without the Company’s management present, discussed and reviewed the results of the audit of the Company’s financial statements by [AUDITORS LLP] and other matters related to the conduct of the audit of the Company’s financial statements. [AUDITORS LLP] informed the Committee that [AUDITORS LLP] has made no report or comment on internal control over financial reporting or other internal control matters or recommendations that would warrant a response by management.

Additionally, the Committee discussed with the [AUDITORS LLP] representatives the matters required to be discussed under Auditing Standard No. 18 (AS18), *Related Parties*, and other related auditing standards, including without limitation information regarding the Company’s relationships with related parties, the Company’s

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\(^1\) On August 15, 2012, the PCAOB adopted Auditing Standard No. 16 (AS16), *Communications with Audit Committees*, and amendments to other PCAOB standards (http://pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_16.aspx). The standard established requirements that enhance the relevance and timeliness of the communications between the auditor and the audit committee and was intended to foster constructive dialogue between the two on significant audit and financial statement matters. The standard supersedes auditing standards AU sec. 310, *Appointment of the Independent Auditor*, and SAS 61, as amended (AU sec. 380, *Communication with Audit Committees*), as adopted by the PCAOB in Rule 3200T, and amends other PCAOB standards. The standard and related amendments became effective for public company audits of fiscal periods beginning on or after December 15, 2012. Because AS16 affects the communications between the audit committee and the auditors, we recommend that audit committees discuss the communication requirements and responsibilities together with the auditors and also that you make any further edits to these resolutions as needed based on the communications between the audit committee and the auditors under AS16 requirements. Additionally, note that Exchange Act Regulation S-K Item 407(d) requires the audit committee report in the proxy statement to disclose whether this communication occurred. As of the date of these materials, the SEC has yet to update the former references to SAS 61 in Item 407(d) of Regulation S-K. For more information, you may also contact the Baker & McKenzie attorney with whom you work.

\(^2\) Include this language if the auditors provide such communication in a letter format.
significant unusual transactions and the Company’s financial relationships and transactions with its executive officers.³

**Rule 2-07 Report**

In connection with the financial statements for the fiscal year ended __________, 20__, [AUDITORS LLP] provided their report to the Committee required in connection with the annual audit pursuant to SEC Regulation S-X Rule 2-07 concerning:

- all critical accounting policies and practices to be used;
- all alternative treatments within generally accepted accounting principles for policies and practices related to material items that have been discussed with management of the Company, including: (i) ramifications of the use of such alternative disclosures and treatments; and (ii) the treatment preferred by the independent registered public accounting firm; and
- other material written communications between the independent registered public accounting firm and the management of the Company, such as any management letter or schedule of unadjusted differences.

³ In June 2014, the PCAOB adopted Auditing Standard No. 18 (AS18), Related Parties, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. The SEC approved the rules on October 21, 2014. Directed at auditors, the new and amended auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions, and (3) a company’s financial relationships and transactions with its executive officers. The standards also expand the required communications that an auditor must make to the audit committee related to these three areas, including communications of the auditor’s evaluation of the company’s relationships with related parties, further discussion between the auditor and committee regarding the business purpose of the company’s significant unusual transactions and additional discussion concerning the company’s financial relationships and transactions with its executive officers. AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within these fiscal years.
Retention of [AUDITORS LLP] for Audit, Review and Attest Services for Current Fiscal Year and Responsibility of [AUDITORS LLP] to Report Directly to the Committee

The Committee then discussed with the representatives of [AUDITORS LLP] matters relating to their engagement to audit and review the Company’s financial statements for the current fiscal year ending on __________, 20__, and to provide the attestation report concerning management’s evaluation of the Company’s internal control over financial reporting for that year. This discussion included the following:

- the requirement under SEC rules and listing standards that the Committee must be directly responsible for the appointment, compensation, retention and oversight of the work of [AUDITORS LLP] in connection with audit, review and attest services, and the obligation of [AUDITORS LLP] to report directly to the Committee;

- representatives of [AUDITORS LLP] explained how they plan to monitor their services for the Company and its subsidiaries under these rules and the SEC’s auditor independence rules and communicate with the Committee so that the Committee can fulfill its responsibilities, and they described their policies designed to ensure that [AUDITORS LLP] undertake no audit, review, attest or permissible non-audit services for the Company or any of its subsidiaries unless these services and the fees and terms of the services have first been approved by the Committee;

- review of the service team of [AUDITORS LLP] who will be engaged for the current fiscal year, planned staffing and areas of staff expertise and seniority;

- a presentation by [AUDITORS LLP] concerning their proposed engagement letter(s) for the audit of the Company’s financial statements for the current year, review of the Company’s quarterly financial statements filed with the SEC, and required attestation
report on management’s assessment of internal control over financial reporting to be included in the Form 10-K filed for the current year, together with a review of the fees proposed for these services and a discussion of the sufficiency of these fees for these purposes; and

- a review and discussion by the Committee, without representatives of [AUDITORS LLP] present, of the fees and other material terms of the proposed engagement letter(s) for the services described above.

**Review of Financial Statements, Form 10-K and Related Matters with Management**

Messrs. ________ and ____________ [management] joined the meeting at this point. The Committee reviewed with these officers and the [AUDITORS LLP] representatives the results of the audit of the Company’s financial statements, and discussed management’s responsibility for the preparation of the financial statements, and [AUDITORS LLP]’s responsibility for the examination of those statements in accordance with applicable auditing and accounting standards. The Committee reviewed and discussed with the Company’s management representatives the audited financial statements, related accounting and auditing principles and practices.

The Committee reviewed and discussed with management the adequacy of the Company’s internal control over financial reporting and related financial management and control personnel, systems and procedures, and management’s perspective on the status of any new accounting or financial reporting requirements, the status of any significant accounting estimates, judgments or extraordinary items concerning the financial statements included in the 10-K, and the other items required under AS16 and Rule 2-07. The Committee also reviewed and discussed with management the matters previously discussed with the [AUDITORS LLP] representatives under AS18 and other related auditing standards.
The Committee reviewed with the Company’s management representatives the Company’s intended disclosures under “Management’s Discussion and Analysis of Financial Condition and Results of Operations” to be included in the 10-K.

The Committee’s review with management and the auditors also included the following specific topics:

**Internal Control**

- *Implementation and documentation* - status of the Company’s implementation and documentation of internal control over financial reporting in a manner that will permit management to report on the effectiveness of internal control and to permit [AUDITORS LLP] to provide an attestation report evaluating management’s assessment.

- *Concerns and issues* - any concerns or issues under the internal control systems that existed during the recently completed fiscal year.

**Financial**

- *Impairments and charges* - analyses of asset impairment under ASC 360-10 (formerly SFAS 144) and restructuring charges relevant to the Company.

- *Reserves and adjustments* - material releases and additions to reserves and adjustments to all material valuation or other allowances, including allowance for doubtful accounts, and deferred tax assets.

- *Deferrals* - any significant deferral of expenses, capitalized costs or revenues, and related policies and procedures.

- *Revenue recognition* - application of revenue recognition policies and any significant judgments or estimates or changes in policies.
or practices in that regard, including policies for classifying license and maintenance fees, non-monetary exchange or barter transactions, multiple element arrangements and the like.

- **Auditor positions** - adjustments suggested or recommended by the auditors or disagreements with the auditors.

- **Non-GAAP financial measures** - review with management of its policies and plans concerning use of non-GAAP financial measures in press releases.

- **New developments** - any unique or new developments in financial accounting in the Company’s industry.

- **Risk assessment** - management’s assessment of the Company’s exposure to risk and steps management has taken to monitor and control this exposure, including without limitation a review by management of contractual indemnity and product liability exposure, currency risks, cybersecurity risks, receivable collection risks, risks relating to compliance with financial reporting obligations and other public disclosure of financial obligations, insurable risks, and legal risks. [Note - this assessment should include risks associated with the business as a whole or particular business units or divisions and the relationship between the company’s compensation policies and risk in accordance with SEC regulations on proxy disclosure enhancement.]
Legal

- **Ethics** - status of the Company’s program to adopt and maintain a code of business conduct (as defined in the listing standards) that applies to the directors, officers and employees of the Company.

- **Related party transactions** - confirmation that the Company has entered into no transactions with related parties as defined in SEC Regulation S-K Item 404 and Accounting Standards Codification 850 (which is outlined in the D&O Questionnaire the Company has previously circulated in connection with the annual disclosure documents) (other than director and executive officer compensatory arrangements fully disclosed to and formally approved by the Compensation Committee).\(^4\)

- **Prohibited or undisclosed insider transactions** - absence of prohibited extensions of credit in the form of personal loans to directors and executive officers, and absence of any perquisites or other compensatory arrangements with or for the benefit of directors or officers that must be, but are not, disclosed in the Proxy Statement.

- **Section 10A report** - confirmation that [AUDITORS LLP] is not required to make a report under Section 10A of the Securities Exchange Act of 1934 and has not detected or otherwise become aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred.

- **No improper influence on auditors** - confirmation from [AUDITORS LLP] that they are not aware that anyone within the Company or outside the Company has improperly influenced

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\(^4\) Revise accordingly if the Company has related person transactions under Regulation S-K Item 404 and/or ASC 850.
them in the course of their audit within the meaning of SEC Rule 13b2-2.

- **SEC review status** - status of any completed or pending review of the Company’s public disclosure documents or releases by the SEC.

- **Attorney reports** - confirmation that no in-house or outside attorneys have made any formal report of evidence of a material violation of US securities laws, breach of fiduciary duty, or material breach of similar law to the Company’s chief legal officer under the SEC’s attorney conduct rule.

- **Other violation of law** - absence of any reports of material violations of the Foreign Corrupt Practices Act or other material laws affecting the Company’s operations or business, or basis for any such report.

- **Evaluation of lawsuits** - status of pending lawsuits, including management’s assessment under ASC 450 as to whether or not there is a reasonable possibility that any such matters could result in a material loss to the Company, and if so, management’s estimate of the range of such loss or explanation as to why such an estimate cannot be made.

- **Evaluation of complaints** - status of any “whistleblower” complaints and results of any investigations.

- **Tax matters** - report by management concerning plans or arrangements, if any, adopted or contemplated by the Company which have as their principal purpose the avoidance of any tax (including any such plans which have been furnished by anyone outside the Company on a condition of confidentiality or for any significant fee), and a description of facts, transactions or circumstances, if any, that the Company is or will be required to report as a “tax shelter” or similar listing under any federal or state tax regulations.
Discussion of Audit Committee Complaint Procedures

The Committee discussed with management representatives the requirements of SEC Rule 10A-3 that every audit committee must establish procedures for: (a) the receipt, retention, and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls, or auditing matters; and (b) the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters.

[Edit as appropriate to describe complaint system; all accounting complaints must at some point be routed to the Audit Committee without filtering by management on the basis of credibility or other filter; this assumes the company is implementing a hotline type service and also providing a means of directly communicating with the Audit Committee or the Chair of the Audit Committee.]

[The General Counsel of the Company reported that, as set forth in the proposed Code of Business Conduct to be presented for approval to the Company’s Board of Directors, the Company continues to retain a third party service provider to maintain an ethics “hotline” service that enables all employees of the Company to make identifiable or anonymous complaints about any matter through the hotline service. Through the service provider’s systems and communications with the Company, the Company’s management expects that all complaints about accounting, internal accounting controls, or auditing matters will be brought to the attention of the Committee, regardless of materiality or other screening.]

[In addition, as set forth in the Code of Conduct and disclosed in the Proxy Statement, employees, shareholders and anyone else may contact the Committee by email or mail through systems that give only Committee members access to these communications.]

[Discussion, as applicable, of any reports from the above systems or changes in the above systems.]
Review of Audit Committee Charter and Composition

The [AUDITORS LLP] representatives left the meeting at this point.

The Committee assessed the adequacy of its charter in light the listing standards and applicable SEC rules, and in that connection reviewed and discussed (i) [the current form of] [a proposed amended and restated] Charter of the Audit Committee attached as Appendix A to these minutes (the “Charter”), and the draft Report of the Audit Committee attached as Appendix B (the “Report”) to these minutes for inclusion in the Proxy Statement, and (ii) the effectiveness of the Committee in carrying out its responsibilities.

The Committee also reviewed and discussed the director independence rules, additional SEC requirements for independence of audit committee members, and the listing standards concerning audit committee composition and functions. Based on the results of a questionnaire circulated to each member of the Committee by the Company’s General Counsel and further discussion of the questionnaire with the General Counsel at this meeting, each member of the Committee has confirmed that he or she qualifies as “independent” under the listing standard definitions and additional SEC definition of audit committee member independence.

[NASDAQ: Further, each Committee member confirmed to each other that he or she has not participated in the preparation of the financial statements of the Company or any current subsidiary of the Company at any time during the past three years; and is able to read and understand fundamental financial statements, including the Company’s balance sheet, income statement, and cash flow statement.]

[NASDAQ: __________________ confirmed to the Committee that he [she] has past or current employment experience in finance or accounting [requisite professional certification in accounting or other comparable experience] such that he [she] satisfies the requirement of the NASDAQ listing standards that at least one member of the
Committee meet the financial sophistication measure stated in those rules.]

[Each Committee member also confirmed that he/she is financially literate as required by NYSE listing standards.]

[NYSE or NASDAQ may use: _________________ confirmed to the Committee that he [she] believes he [she] meets the SEC definition of “audit committee financial expert” as defined in SEC rules attached as Appendix C to these minutes and consents to being identified as the audit committee financial expert as set forth in the Proxy Statement.] OR [Finally, the Committee discussed whether or not at least one member of the Committee meets the SEC definition of “audit committee financial expert” as defined in SEC rules attached as Appendix C to these minutes, and the Committee concluded that none of its members meets this definition.]

Based on the foregoing, and such other further discussion and review as the Committee considered appropriate, and on motion duly made, seconded and unanimously approved, the Committee approved the following resolutions:

**Financial Statements and 10-K**

Resolved, that the Committee recommends to the Board of Directors that the Company’s audited financial statements referred to above be included in the 10-K, and the Chairperson of this meeting is hereby authorized to report the results of the audit and other matters resolved below to the Board of Directors.

**Charter Restatement**

[Resolved, that the Committee has reassessed its Charter, and recommends to the Board of Directors that the Charter be amended and restated in the form set forth in Appendix A to these resolutions and, in the form approved by the Board of Directors, included as an appendix to the Proxy Statement.]
[Resolved, that the Committee has reassessed its Charter and ratifies it without further change.]

**Report of the Committee in Proxy Statement**

Resolved, that the Committee hereby approves the Report, and recommends to the Board of Directors that the Report be included in the Proxy Statement, with such corrections or insubstantial changes as the officers of the Company or any of them believe appropriate.

**Independence of the Auditors and Appointment**

Resolved, that the Committee finds no reason to believe that [AUDITORS LLP] is not independent for purposes of their audit and review services for the fiscal year most recently ended, and services for the current year described below;

Resolved further, that the Committee hereby appoints [AUDITORS LLP] to audit the Company’s financial statements for the fiscal year ending ____________, 20__, subject to shareholder ratification as set forth in the Proxy Statement, to provide the attestation report on management’s evaluation of internal control over financial reporting for that year, and to provide the required quarterly review services in connection with the quarterly financial statements the Company files with the SEC, on the terms and conditions set forth in the engagement letter(s) presented to this meeting as described in these minutes, [note that the Committee usually signs the engagement letter; if not: and further authorizes the officers or any of them on behalf and in the name of the Company to sign and deliver these engagement letter(s)].

**Adoption of Complaint Procedures**

Resolved, that the Committee hereby [adopts and approves] [ratifies] the Complaint Procedures described earlier in these
minutes and authorizes and directs the officers of the Company or any of them to [implement] [continue to maintain] the ministerial reporting aspects of the Complaint Procedures and to cause the Company to maintain and pay for these procedures;

Resolved further, that the Committee directs the officers to [continue to] report to the Committee any and all complaints that may come to the attention of the officers concerning questionable accounting, internal accounting controls, or auditing matters, whether made by employees, shareholders, parties who do business with the Company or otherwise, without regard to their credibility or materiality; provided that the Chairperson of the Committee is authorized to establish procedures with appropriate officers for the periodic reporting to the Committee of all complaints and prompt reporting to the Chairperson of the Committee of any complaints that any officer has reason to believe are credible and significant.

**Advisory Resolution on Committee Composition**

Resolved, that to assist the Board of Directors in determining whether the members of the Committee are independent and whether the Committee has one member who qualifies as an audit committee financial expert as such topics are required to be discussed in the Proxy Statement, the Committee finds, based on its belief and judgment, that (i) all of its members are independent as defined in the listing standards and applicable SEC rules and the Committee otherwise meets the audit committee composition requirements of the listing standards, and (ii) [________________ qualifies as an audit committee financial expert for purposes of the relevant disclosure requirement in the Proxy Statement] OR [none of the Committee members qualifies as an audit committee financial expert.]
[Derivative Transactions]

Additionally, as the Board of Directors has delegated to the Committee the review and consideration of the Company’s use of derivative transactions at least annually, the Committee reviewed and discussed with management the Company’s policies governing the use of swaps and other derivative transactions, including those subject to the “end-user exception” set forth in Sections 2(h)(1) and 2(h)(8) of the Commodity Exchange Act (“End-user Exception”). The Committee reviewed and considered the risks and benefits of entering into swaps without clearing and exchange trading and execution in reliance on the End-user Exception. Based on the foregoing, and such other further discussion and review as the Committee considered appropriate, and on motion duly made, seconded and unanimously approved, the Committee approved the following resolutions:

Resolved, that the Company’s decision to enter into swaps, including those that may not be subject to clearing and exchange trading and execution requirements in reliance on the End-user Exception is in the best interests of the Company and is hereby approved.

Resolved, that the Company’s policies governing its use of swaps and other derivative transactions, including those subject to the End-user Exception are hereby approved.

Resolved, that the officers of the Company or any of them, with the assistance of such legal and other advisers as they deem appropriate, are hereby authorized to undertake such other actions and to execute, deliver, acknowledge, and file such other documents and instruments as may be necessary or appropriate to comply with the applicable rules and regulations relating to the
foregoing resolutions under the Commodity Exchange Act and any other applicable laws.)5

There being no further business to come before the meeting, the meeting was adjourned.

APPENDIX A-C to the Minutes:

APPENDIX A: Attach current form of the company’s charter, or, if applicable, proposed form of amended charter.

APPENDIX B: Prepare and attach audit committee report for inclusion in proxy statement in compliance with requirements under Item 407(d)(3) of Regulation S-K.6

5 The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created a regulatory regime administered by the Commodity Futures Trading Commission pursuant to which derivatives transactions must be submitted for clearing to a derivatives clearing organization unless they satisfy the End-user Exception. The End-user Exception requires a company that files reports with the SEC to have the Board of Directors or an appropriate committee of the Board set appropriate policies governing the company’s use of swaps subject to the End-User Exception and to review those policies at least annually. Include these resolutions if the Board has delegated this responsibility to the Audit Committee, and the Audit Committee reviews these policies as part of its annual review process at this time.

6 As discussed elsewhere in this checklist, in a May 2014 speech, SEC Chair Mary Jo White noted that investors have expressed significant interest in increased transparency into audit committee activities. Chair White noted that she has asked the SEC staff to consider whether audit committee reporting requirements can be improved to make the reports more useful to investors. An increasing number of companies have been providing non-required disclosures in their proxy statements (more specifically in the Audit Committee Report) about their audit committees and audit committee oversight practices (for e.g., increased transparency about external auditor oversight practices). Furthermore, in response to continued interest in this area by investors, on July 1, 2015, the SEC published a concept release seeking public comment on current audit committee disclosure requirements, focusing on the committee’s oversight of the independent registered public accounting firm. The comment period closed on September 8, 2015. Comments received can be found at http://www.sec.gov/comments/s7-13-15/s71315.shtml. Developments in this area are noteworthy given the increased focus on audit committee disclosures in recent proxy seasons. Companies should continue to monitor this area for developments. Please consult with the Baker & McKenzie attorney with whom you work for further guidance in this area.
Audit Committee Report [NOTE: CONSULT ITEM 407(d)(3) BEFORE FILING FOR ANY TECHNICAL CHANGES OR OTHER UPDATES TO THE TEXT BELOW]:

[Omit italicized legend if included in general legend elsewhere in the proxy statement:] The information contained in this report shall not be deemed to be “soliciting material” or “filed” or incorporated by reference in future filings with the Securities and Exchange Commission, or subject to the liabilities of Section 18 of the Securities Exchange Act of 1934, except to the extent that the Company specifically incorporates it by reference into a document filed under the Securities Act of 1933, as amended, or Securities Exchange Act of 1934, as amended.

The following is the report of the Audit Committee with respect to the Company’s audited financial statements for the fiscal year ended ____________, included in the Company’s Annual Report on Form 10-K for that year.

The Audit Committee has reviewed and discussed these audited financial statements with management of the Company.

The Audit Committee has discussed with the Company’s independent registered public accounting firm, [AUDITORS LLP], the matters required to be discussed by [the Statement on Auditing Standards No. 61, as amended (AICPA, Professional Standards, Vol. 1, AU section 380), as adopted by the Public Company Accounting Oversight Board in Rule 3200T, or any successor rule] [the Public Company Accounting Oversight Board Auditing Standard No. 16, Communications with Audit Committees (successor to Statement on Auditing Standards No. 61, as amended (AICPA, Professional Standards, Vol. 1, AU section 380), as adopted by the Public Company Accounting Oversight Board in Rule 3200T)].

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7 As discussed above at footnote 1, the PCAOB adopted Auditing Standard No. 16 (AS16), Communications with Audit Committees. The standard supersedes auditing standards AU sec.
The Audit Committee has received the written disclosures and the letter from the independent registered public accounting firm required by applicable requirements of the Public Company Accounting Oversight Board regarding the independent registered public accounting firm’s communications with the Audit Committee concerning independence, and has discussed with [AUDITORS LLP] its independence.

Based on the review and discussions referred to above in this report, the Audit Committee recommended to the Company’s Board of Directors that the audited financial statements be included in the Company’s Annual Report on Form 10-K for the year ended __________ for filing with the Securities and Exchange Commission.

Submitted by the Audit Committee
of the Board of Directors

[NAME OF EACH MEMBER OF COMMITTEE]

310, Appointment of the Independent Auditor, and SAS 61, as amended (AU sec. 380, Communication with Audit Committees), as adopted by the PCAOB in Rule 3200T, and amends other PCAOB standards. As of the date of these materials, the SEC has yet to update the former references to SAS 61/AU section 380 in Item 407(d) of Regulation S-K. Thus, we have added the reference to “any successor rule” to the end of the sentence. You may also consider referencing AS16 as the successor to SAS 61. For more information, you may contact the Baker & McKenzie attorney with whom you work.
APPENDIX C: Attach definition of audit committee financial expert at Item 407(d)(5) of Regulation S-K:

Appendix C to minutes: SEC definition of audit committee financial expert

Item 407(d)(5) of the SEC’s Regulation S-K defines “audit committee financial expert” as follows:

(i)(A) Disclose that the registrant’s board of directors has determined that the registrant either:

(1) Has at least one audit committee financial expert serving on its audit committee; or

(2) Does not have an audit committee financial expert serving on its audit committee.

(B) If the registrant provides the disclosure required [by this item], it must disclose the name of the audit committee financial expert and whether that person is independent, as that term is used in [the applicable listing standards].

(C) If the registrant provides the disclosure required by [the applicable provisions] of this item, it must explain why it does not have an audit committee financial expert.

Instruction to Item 407(d)(5)(i)

If the registrant’s board of directors has determined that the registrant has more than one audit committee financial expert serving on its audit committee, the registrant may, but is not required to, disclose the names of those additional persons. A registrant choosing to identify such persons must indicate whether they are independent pursuant to [the applicable independence test].
(ii) For purposes of this item, an *audit committee financial expert* means a person who has the following attributes:

(A) An understanding of generally accepted accounting principles and financial statements;

(B) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(C) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant’s financial statements, or experience actively supervising one or more persons engaged in such activities;

(D) An understanding of internal controls and procedures for financial reporting; and

(E) An understanding of audit committee functions.

(iii) A person shall have acquired such attributes through:

(A) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(B) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(C) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
(D) Other relevant experience.

(iv) Safe Harbor

(A) A person who is determined to be an audit committee financial expert will not be deemed an expert for any purpose, including without limitation for purposes of section 11 of the Securities Act of 1933 (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 407.

(B) The designation or identification of a person as an audit committee financial expert pursuant to this Item 407 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(C) The designation or identification of a person as an audit committee financial expert pursuant to this item does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.
Sample Compensation Committee Resolutions

This sample of compensation committee resolutions is current only as of October 2015 and is for informational purposes only and may not be relied upon as legal advice.

[Company, Inc.]

Compensation Committee Meeting Held on _______, 20__

Upon due notice, a meeting of the Compensation Committee (the “Committee”) of the Board of Directors (“Board”) of [COMPANY, Inc.] (the “Company”) was held on ______ at the offices of the Company in ________________, [State]. ____________, ___________ and ______________, constituting the entire Committee, were present in person or participating by telephone conference call in which all persons present at the meeting could hear each other. Also in attendance in person or by conference call were [list compensation consultants, legal advisers, members of management and others present].

Prior to the meeting, the Company circulated to the members of the Committee the following agenda and documentation: [list]. The Company also circulated to the members of the Committee a draft proxy statement (the “Proxy Statement”) for the Annual Meeting of Shareholders scheduled for _______________ (“Annual Meeting”) (with notice of meeting and form of proxy [as well as Notice of Internet Availability of Proxy Materials] ).

________________________ served as Chairperson of the meeting, and __________________ served as Secretary of the meeting. [On motion duly made, seconded and unanimously approved, the minutes of the ____________, 20__, meeting were approved.]

The Committee then proceeded to discuss and review the Company’s Compensation Discussion and Analysis, substantially in the form included in the Company’s Proxy Statement previously circulated (the “CD&A”), including the Company’s summary executive
compensation tables and related narrative information (the “Summary Compensation Information”), and the form of Compensation Committee Report, previously circulated and substantially in the form attached as Appendix A hereto (the “Report”). The Committee also discussed and reviewed [list any other information reviewed]. The Committee then discussed the CD&A and Summary Compensation Information with members of management including, [list names and titles], and also discussed with ____________, its [independent] compensation consultant, the CD&A, Summary Compensation Information and [list any other information reviewed].

The Committee assessed the adequacy of its charter in light the listing standards and applicable SEC rules, and in that connection reviewed and discussed [the current form of] [a proposed amended and restated] Charter of the Compensation Committee attached as Appendix B to these minutes (the “Charter”).

[Also include a discussion of any other items discussed by the Committee at the meeting.]

Based on the foregoing, and such other further discussion and review as the Committee considered appropriate, and on motion duly made, seconded and unanimously approved, the Committee approved the following resolutions:

Approval of CD&A and Summary Compensation Information

Resolved, that the CD&A and Summary Compensation Information, substantially in the form presented, be, and they hereby are approved.

Resolved further, that based on its review and discussions with management [and ____________, its [independent compensation consultant]], the Committee recommends to the Board that the CD&A and Summary Compensation Information be included in the Company’s Proxy Statement for filing with the Securities and Exchange Commission, with such corrections or insubstantial changes
as the officers of the Company or any of them believe appropriate, and subject to approval of the Proxy Statement by the Board.

Approval of Compensation Committee Report

Resolved, that the Committee’s review of, and discussions with management regarding, the CD&A (including the Summary Compensation Information) and the Committee’s recommendation that the CD&A be included in the Proxy Statement be reflected in the Report.

Resolved further, that the Report, substantially in the form attached hereto as Appendix A, be, and it hereby is, approved and that the Committee recommends to the Board that the Report be included in the Proxy Statement for filing with the SEC, with such corrections or insubstantial changes as the officers of the Company or any of them believe appropriate.

[If applicable: Approval of Say-on-Pay Proposal]

Whereas, the Committee has reviewed and [approved ] [recommended to the Board for its approval], the compensation of the Company’s named executive officers as disclosed in the CD&A and the Summary Compensation Information;

Whereas, the Committee has reviewed and approved the CD&A and the Summary Compensation Information and recommended that this information be included in the Proxy Statement; and

Whereas, the Company is required under the securities laws to submit a resolution for its shareholders to approve the compensation of its named executive officers as disclosed in the Proxy Statement at least once every three years.

Resolved, that the Committee recommends to the Board that the compensation of the Company’s named executive officers, as disclosed in the CD&A and the Summary Compensation Information, be submitted to a nonbinding advisory vote of the shareholders of the
Company (“Say-on-Pay Vote”) at the Annual Meeting and that a proposal regarding the Say-on-Pay Vote (“Say-on-Pay Proposal”) be included in the Proxy Statement.

Resolved further, that the Committee recommends that the Board unanimously recommend that the shareholders of the Company approve the Say-on-Pay Proposal.

[If applicable: Approval of Frequency of Say-on-Pay Proposal]

Whereas, the Company is required under the securities laws to submit a resolution for its shareholders to vote on how frequently to hold a nonbinding advisory vote to approve the compensation of its named executive officers as disclosed in the Proxy Statement (“Say-on-Pay Vote”) at least once every six years.

Resolved, that it is in the best interests of the Company that a Say-on-Pay Vote be submitted to the shareholders every [year] [two years] [three years] (“Frequency of Say-on-Pay Vote”).

Resolved further, that the Committee recommends that the Board [approve the Frequency of Say-on-Pay Vote] [ratify the Committee’s approval of the Frequency of Say-on-Pay Vote].

Resolved further, that the Committee recommends to the Board that a proposal regarding how frequently to hold a Say-on-Pay Vote be included in the Proxy Statement and submitted to the shareholders of the Company for a vote at the Annual Meeting.

Resolved further, that the Committee recommends that the Board unanimously recommend that the shareholders of the Company vote in favor of the Frequency of Say-on-Pay Vote.

Charter Review

[Resolved, that the Committee has reassessed its Charter, and recommends to the Board that the Charter be amended and restated in the form set forth in Appendix B to these resolutions.]
[Resolved, that the Committee has reassessed its Charter and ratifies it without further change.]

There being no further business to come before the meeting, the meeting was adjourned.

**Include APPENDIX A-B to the Minutes.**
Sample Board of Director Resolutions

These materials include two sets of sample board resolutions — one for the board’s initial meeting and another for a follow-up meeting. These samples are current only as of October 2015 and are for informational purposes only and may not be relied upon as legal advice.

[Company, Inc.]

Initial 20___ Annual Meeting Resolutions of the Board of Directors

Meeting Held on [date soon after fiscal year end]

Date, Time and Location of Annual Meeting

Resolved, that pursuant to its authority under Article __, Section __ of the Company’s Bylaws, the Board of Directors hereby determines that the Annual Meeting of Shareholders of the Company following the end of fiscal year 20___ shall be held at ____ a.m., local time, on ______________, 20___, at a location to be determined by any one or more of the officers of the Company (the “Annual Meeting”);

Record Date

Further resolved, that pursuant to its authority under Article ____, Section ____ of the Company’s Bylaws, the Board of Directors hereby fixes the close of business on ______________, 20___, as the record date for determining shareholders entitled to notice of and to vote at the Annual Meeting and any adjournment or postponements thereof;

Management Proxies

Further resolved, that the Board of Directors solicit proxies appointing [e.g., CEO, CFO and/or Secretary/General Counsel], together or separately, as management proxies to serve at the Annual Meeting;
Inspector of Elections

Further resolved, that [TRANSFER AGENT or INDEPENDENT THIRD PARTY] is hereby appointed Inspector of Elections, to serve at the Annual Meeting; and

Agenda

Further resolved, that the agenda for the Annual Meeting shall be:

(a) the election of ________ directors to the Company’s Board of Directors to serve until the Company’s annual meeting following the end of fiscal year ________ or until their successors are elected and qualified;

(b) [If applicable: to approve the compensation paid to the Company’s named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion in the proxy statement;]

(c) [If applicable: to vote on the frequency the Company should hold the advisory vote to approve the compensation of the named executive officers’ (every 1, 2 or 3 years);]

(d) to ratify the appointment of the firm of [AUDITORS LLP] as the independent registered public accounting firm of the Company for the fiscal year ending [the current year not ended]; and

(e) such other business as may appropriately come before the meeting.
Executive Officers for Purposes of Section 16 Under the Securities Exchange Act of 1934

Whereas,

(a) more than 10% shareholders, directors and certain officers of the Company are subject to reporting obligations concerning beneficial ownership of the Company’s Common Stock and other provisions of Section 16;

(b) “officers” for this purpose means, under SEC Rule 16a-1, the president, principal financial officer, principal accounting officer (or, if there is no principal accounting officer, the controller), any vice-president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a significant policy-making function, or any other person who performs similar significant policy-making functions for the Company; and

(c) it is presumed that the individuals who are identified, as required under SEC rules, in the Company’s proxy statement or Form 10-K as executive officers are also officers for purposes of Section 16

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1 In analyzing which officers to designate as Section 16 Reporting Persons, consider the May 2013 opinion of the US District Court for the District of Columbia available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009cv1423-158, which gives examples of factors to consider when determining whether a person who does not hold one of the titles specified in Rule 16a-1(f) should nevertheless be considered an officer because he or she “performs a policy-making function for the issuer.” Additionally, in light of the rules proposed by the SEC in July 2015 to require the national securities exchanges and associations to establish listing standards that require public companies to adopt, implement and disclose a compensation clawback policy providing for recovery of excess incentive-based compensation from current and former executive officers, as mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, companies should consider that the SEC has modeled the definition of “executive officer” covered in the proposed rules on the definition of “officer” under Section 16 of the Exchange Act. Clawback policies are also to apply to both former and current “executive officers” who were such during the clawback period, which is three years. Companies may want to review and reassess the duties of their executive officers to be certain they are comfortable with those in the group likely becoming subject to the clawback rules once finalized and adopted by the SEC and stock exchanges.
described above and that the Board of Directors has made a judgment to that effect;

Therefore, the Board has further resolved that the following individuals are the only persons meeting the definition of, and shall constitute, the “officers” of the Company for purposes of Section 16 of the Securities Exchange of 1934, as amended, and shall be listed as executive officers in the Company’s proxy statement or Annual Report on Form 10-K: [list individuals]
[Company, Inc.]

Additional 20__ Annual Meeting Resolutions of the Board of Directors

Meeting Held on [date soon after fiscal year end]

Whereas, at its meeting on ____________, 20___, the Board of Directors has approved ____________, 20__, as the date for the annual meeting of shareholders in 20___ (the “Annual Meeting”), ____________, 20___, as the record date for the Annual Meeting, appointment of _______________ and ______________ as management proxies for the meeting, appointment of ______________ as inspector of elections, the agenda for the meeting consisting of election of directors, [If applicable: shareholder approval of the compensation paid to the Company’s named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion in the proxy statement.] [If applicable: shareholder vote on the frequency the Company should hold the advisory vote to approve the compensation of the named executive officers’ (every 1, 2 or 3 years),] ratification of appointment of the independent registered public accounting firm and such other matters as may come before the meeting;

[Consider need for adjustment of board size to reduce authorized number to number of nominees or to increase board size to meet independent majority requirements] [Whereas, [Director _______ has recently resigned from the Board of Directors and the Board of Directors has by unanimous written consent previously reduced the authorized number of directors to ________ (__) in connection with his resignation;]

Whereas, the Nominating and Corporate Governance Committee met on ____________, 20__, and reviewed and discussed the qualifications, experience, independence and such other factors as it deemed necessary and relevant for each of the candidates for election to the
Board of Directors at the Annual Meeting, and has reported to the Board of Directors its resolutions pertaining to these matters, including its recommending that [insert director names] be nominated for election to the Board of Directors at the Annual Meeting to serve a ___ year term or until their successors are elected and qualified;

Whereas, the Board of Directors has evaluated the independence of directors ____________[list non-management directors to be classified as independent] under applicable listing standards for purposes of determining that a majority of the board of directors is comprised of independent directors as defined under the listing standards based on a review of independence questionnaires appended to these resolutions as Appendix A and circulated among these directors and discussion by our full board of directors with our General Counsel on this date that included a review of the specific listing standard definitions that preclude a finding of independence together with a review of any other relationships between each of these directors and our Company and its subsidiaries, as more fully set forth in the questionnaire;

Whereas, the Board of Directors has further evaluated whether or not directors ______________, __________ and ______________ are independent directors for purposes of the audit committee composition requirements under listing standards and applicable SEC rules based on a review of the questionnaires referred to above and discussion by our full board of directors with our General Counsel on this date of the information included in response to that questionnaire and on which this determination is based;

Whereas, the Board of Directors has evaluated whether or not ____________________ qualifies as an “audit committee financial expert” as defined under SEC rules based on a review of the questionnaire referred to above and discussion by our full board of directors with our General Counsel on this date of the information included in response to that questionnaire and on which this determination is based;
Whereas, the Audit Committee of the Board of Directors met on ________________, 20__, and has reported to the Board of Directors its resolutions pertaining to certain accounting and auditing matters, including its appointment of [AUDITORS LLP] as the independent registered public accounting firm of the Company for the fiscal year ending ________________, 20__, subject to ratification by the Company’s shareholders, recommendation that the audited financial statements for the fiscal year ended __________, 20__ be included in the Annual Report on Form 10-K for that year, its review of the independence of [AUDITORS LLP] as the Company’s independent registered public accounting firm, its receipt of reports and required communications from [AUDITORS LLP] under AS16 and SEC Regulation S-X Rule 2-07 concerning critical accounting policies and other matters outlined in that rule, and matters relating to the annual assessment, [its receipt of required communications from [AUDITORS LLP] under AS 18 and other related auditing standards,] [recommendation of a restated, Audit Committee Charter,] and approval of the Report of the Audit Committee (“Audit Report”) to be included in the proxy statement for the Annual Meeting;

Whereas, the Board of Directors has further evaluated whether or not directors ________________, ______________ and ________________ are independent directors for purposes of the compensation committee composition requirements under listing standards and applicable SEC rules based on a review of the questionnaires referred to above and discussion by our full board of directors with our General Counsel on this date of the information included in response to that questionnaire and on which this determination is based;

[Whereas, in addition to the Audit Committee matters referred to above, the Board of Directors has reviewed with our Company’s General Counsel on this date the listing standards relating to corporate governance matters, and desires to adopt amended and restated charters for the Compensation Committee and Nominating and Corporate Governance Committee, a statement of governance principles for the full board of directors, and a code of business]
conduct that are intended to meet the applicable requirements of the listing standards;

Whereas, the Compensation Committee of the Board of Directors met on __________, 20__, and reviewed and approved the Company’s Compensation Discussion and Analysis, compensation tables and narrative discussion, and Report of the Compensation Committee (“Compensation Report”), substantially as included in the drafts of the proxy materials, and has reported to the Board of Directors its resolutions pertaining to these matters, including its recommending that the compensation paid to the Company’s named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion be approved and recommending that the Compensation Discussion and Analysis, compensation tables and narrative discussion, and Compensation Report be included in the proxy statement for the Annual Meeting;

[If applicable: Whereas, the Compensation Committee of the Board of Directors has recommended to the Board that the compensation of the Company’s named executive officers as disclosed in the Compensation Discussion and Analysis and related tables be submitted to a nonbinding advisory vote for approval by the shareholders of the Company (“Say-on-Pay Vote”) at the Annual Meeting;]

[If applicable: Whereas, the Compensation Committee of the Board of Directors has concluded that it is in the best interests of the Company that a Say-on-Pay Vote be held every [year] [two years] [three years] (“Frequency of Say-on-Pay Vote”) and has recommended that the Board ratify and approve the Frequency of Say-on-Pay Vote and that a proposal regarding how frequently to hold a Say-on-Pay Vote be submitted to a nonbinding advisory vote of the shareholders at the Annual Meeting;] and

Whereas, certain drafts of the proxy materials for the Annual Meeting, including the Audit Report, Compensation Discussion and Analysis
and related disclosures and Compensation Report, [and] the Annual Report on Form 10-K for the fiscal year ended ________________, 20___, [and the Annual Report to Shareholders] have been furnished for review by the directors and the directors have considered the recommendations of the Audit Committee and Compensation Committee.

Therefore, be it:

**Director Nominees**

Resolved, that, pursuant to and in accordance with the charter and specific recommendations of the Nominating and Corporate Governance Committee of the Board of Directors, incumbent directors [names] are hereby nominated for election to the Board of Directors at the Annual Meeting to serve a ___ year term or until their successors are elected and qualified.

**Independent Majority**

Resolved, that the Board of Directors affirmatively determines that the [insert number] directors _______________ and ______________ qualify as independent directors under the listing standards based on the review summarized above and that our board of directors therefore has a majority of its authorized and serving number of directors comprised of independent directors as so defined, and authorize the Annual Meeting proxy statement to report this determination.

**Executive Sessions**

Resolved, that the directors classified as independent directors above will continue to meet in executive sessions consisting of regularly schedule meetings at which only independent directors are present not less than twice during each fiscal year and as they may otherwise agree among themselves; and that ________________ is designated to serve as the presiding director of these executive
sessions until a different presiding director may be designated by the Board of Directors.  

**Audit Committee Independence**

Resolved, that in addition to the finding of independence set forth above, the Board of Directors affirmatively determines that directors ____________, ____________, and ____________ also qualify as independent directors for purposes of audit committee membership under the listing standards and applicable SEC rules, and authorize the Annual Meeting proxy statement to report this determination.

**Audit Committee Financial Expert and Sophistication**

[Resolved, that the Board of Directors has determined that ______________ qualifies as an audit committee financial expert as defined under SEC rules and that the Annual Meeting proxy statement referred to below will name him as such an expert.] OR [Resolved, that the Board of Directors has determined that its Audit Committee does not have at least one member who is an audit committee financial expert as defined under SEC rules, and that the reason for not having such a member is ________________________].

[NYSE: Resolved further, that the Board of Directors has determined that each Audit Committee member is financially literate as required by NYSE listing standards for service on the audit committee.]

[NASDAQ: Resolved further, that the Board of Directors has determined that ______________ satisfies the requirement of the listing standards that at least one member of the Audit Committee shall have a level of financial sophistication described in those rules based on employment experience in finance or accounting, requisite professional certification in accounting or any other comparable experience or background as defined therein.]

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2 If the company appoints a lead independent director whose duties include presiding over these executive sessions, revise resolution accordingly.
Compensation Committee Independence

Resolved, that in addition to the finding of independence set forth above, the Board of Directors affirmatively determines that directors ____________, ____________, and ____________ also qualify as independent directors for purposes of compensation committee membership under the listing standards and applicable SEC rules, and authorize the Annual Meeting proxy statement to report this determination.

[Include if amended charter is to be approved: Audit Committee Charter]

Resolved, that the Audit Committee Charter as amended and restated in the form attached as Appendix B to these resolutions is hereby approved and adopted as the charter for the Audit Committee of the Board of Directors, and that the Board of Directors authorize the Annual Meeting proxy statement to include this charter as an appendix as required under applicable SEC rules, unless otherwise available on the Company’s Website in compliance with Item 407.]

[Include if amended charter is to be approved: Compensation Committee Charter]

Resolved, that the Compensation Committee Charter as amended and restated in the form attached as Appendix C to these resolutions is hereby approved and adopted as the charter for the Compensation Committee of the Board of Directors, and that the Board of Directors authorize the Annual Meeting proxy statement to include this charter as an appendix as required under applicable SEC rules, unless otherwise available on the Company’s Website in compliance with Item 407.]

[Include if amended charter is to be approved: Nominating and Corporate Governance Committee Charter]

Resolved, that the Nominating and Corporate Governance Committee Charter as amended and restated in the form attached as Appendix D
to these resolutions is hereby approved and adopted as the charter for the Nominating and Corporate Governance Committee of the Board of Directors, and that the Board of Directors authorize the Annual Meeting proxy statement to include this charter as an appendix as required under applicable SEC rules, unless otherwise available on the Company’s Website in compliance with Item 407.]

[Include if amended principles are to be approved: Governance Principles

Resolved, that the governance principles as amended and restated in the form attached as Appendix E to these resolutions are hereby approved and adopted by the Board of Directors.]

[Include if amended code is to be approved: Code of Conduct

Resolved, that the Code of Business Conduct as amended and restated in the form attached as Appendix F to these resolutions is hereby approved and adopted as a code of conduct for purposes of the listing standards and SEC rules concerning a code of ethics for the chief executive officer and listed finance officers.]

[If applicable: Say-on-Pay Vote

Resolved, that based on the approval and recommendation of the Compensation Committee, the compensation paid to the Company’s named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion is hereby approved.

Resolved further, that a proposal regarding the Say-on-Pay Vote be included in the proxy statement for the Annual Meeting, and that the officers of the Company be, and each of them hereby is, authorized, empowered and directed to submit the Say-on-Pay Vote advisory proposal to the shareholders for their approval at the Annual Meeting.
Resolved further, that the Board unanimously recommends that the shareholders of the Company approve the Say-on-Pay Vote proposal.

Although this vote is advisory and non-binding, the Board of Directors and Compensation Committee will consider the outcome of the vote when making future compensation decisions for named executive officers.]

**If applicable: Frequency of Say-on-Pay Vote**

Resolved, that based on the approval and recommendation of the Compensation Committee, the Board hereby approves that it is in the best interests of the Company that a Say-on-Pay Vote proposal be submitted to a nonbinding advisory vote of the shareholders every [year] [two years] [three years].

Resolved further, that a proposal regarding how frequently to hold a Say-on-Pay Vote be included in the proxy statement for the Annual Meeting, and that the officers of the Company be, and each of them hereby is, authorized, empowered and directed to submit a nonbinding advisory vote on the frequency of holding a Say-on-Pay Vote to the shareholders at the Annual Meeting.

Resolved further, that the Board unanimously recommends that the shareholders of the Company vote in favor of holding a Say-on-Pay Vote every [year] [two years] [three years].]

**Proxy Statement**

Resolved, that the proxy statement, with accompanying letter from the Chairman, notice of meeting and form of proxy [as well as Notice of Internet Availability of Proxy Materials], for the Annual Meeting is hereby approved, and shall be filed with the Securities and Exchange Commission and the Company’s listing exchange as required, and sent to shareholders, in substantially the form previously circulated to the directors and discussed at this meeting, with such changes and supplements as the officers of the Company or any of them shall deem
necessary or appropriate, and the officers of the Company or any of them are authorized and directed, pursuant to those proxy materials, to give notice of the Annual Meeting to the shareholders not less than 10 nor more than 60 days before the date of the Annual Meeting and to solicit proxies for the Annual Meeting pursuant to the proxy statement.

Form 10-K

Resolved, that the Annual Report on Form 10-K for the fiscal year ended __________, 20__, including the audited financial statements for the fiscal year ended __________, 20__, is hereby approved, and shall be filed with the Securities and Exchange Commission and the Company’s listing exchange as required, in substantially the form previously circulated to the directors and discussed at this meeting, with such changes and supplements as the officers of the Company or any them shall deem necessary or appropriate, and the officers of the Company or any of them are authorized and directed to prepare this document in final form and circulate it to the officers and directors of the Company whose signatures are required thereon prior to the Securities and Exchange Commission filing deadline of __________, 20__.

[If preparing Glossy Annual Report: Annual Report to Shareholders]

Resolved, that the Annual Report to Shareholders, is hereby approved, and shall be filed with the Securities and Exchange Commission and the Company’s listing exchange as required, in substantially the form previously circulated to the directors and discussed at this meeting, with such changes and supplements as the officers of the Company or any them shall deem necessary or appropriate, and the officers of the Company or any of them are authorized and directed to complete the preparation, printing and distribution to shareholders of an Annual Report to Shareholders containing the financial statements and other information required by the applicable rules of the Securities and Exchange Commission and the Company’s listing exchange to be set
forth in an annual report to shareholders furnished with or preceding the proxy statement for the Annual Meeting.]

**Auditors**

Resolved, that the Board of Directors acknowledges the Audit Committee’s appointment of [AUDITORS LLP] as the independent registered public accounting firm for the Company for the fiscal year ending ____________, 20___, subject to ratification by the Company’s shareholders.

**General Authorizing Resolutions**

Resolved, that the officers of the Company or any of them, with the assistance of such legal and accounting advisers they deem appropriate, are hereby authorized to (a) execute as needed and file with the Securities and Exchange Commission and the Company’s listing exchange in accordance with applicable rules and regulations the proxy statement and any related written materials for the Annual Meeting, Annual Report on Form 10-K, Annual Report to Shareholders, and other documents and exhibits in connection therewith, and any amendments thereto, (b) correct or modify any insubstantial provisions or typographical errors in these resolutions, and (c) undertake such other actions and execute, deliver, acknowledge, and file such other documents and instruments as may be necessary or appropriate to comply with the applicable rules and regulations of the Securities and Exchange Commission and requirements for continued listing of the Company’s Common Stock on its stock exchange in connection with the matters approved in the foregoing resolutions, solicit proxies for and conduct the Annual Meeting, and otherwise carry out the purpose and intent of the foregoing resolutions. The authority conferred hereby shall be conclusively evidenced by the respective execution, delivery, and filing of any of the foregoing.
[Derivative Transactions]

Additionally, the Board of Directors must review and consider the Company’s use of derivative transactions at least annually. The Board reviewed and discussed with management the Company’s policies governing the use of swaps and other derivative transactions, including those subject to the “end-user exception” set forth in Sections 2(h)(1) and 2(h)(8) of the Commodity Exchange Act (“End-user Exception”). The Board also reviewed and considered the risks and benefits of entering into swaps without clearing and exchange trading and execution in reliance on the End-user Exception. Based on the foregoing, and such other further discussion and review as the Board considered appropriate, and on motion duly made, seconded and unanimously approved, the Board approved the following resolutions:

Resolved, that the Company’s decision to enter into swaps, including those that may not be subject to clearing and exchange trading and execution requirements in reliance on the End-user Exception is in the best interests of the Company and is hereby approved.

Resolved, that the Company’s policies governing its use of swaps and other derivative transactions, including those subject to the End-user Exception are hereby approved.

Resolved, that the officers of the Company or any of them, with the assistance of such legal and other advisers they deem appropriate, are hereby authorized to undertake such other actions and to execute, deliver, acknowledge, and file such other documents and instruments as may be necessary or appropriate to comply with he applicable rules and regulations relating to the
foregoing resolutions under the Commodity Exchange Act and any other applicable laws.]³

³ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created a regulatory regime administered by the Commodity Futures Trading Commission pursuant to which derivatives transactions must be submitted for clearing to a derivatives clearing organization unless they satisfy the End-user Exception. The End-user Exception requires a company that files reports with the SEC to have the Board of Directors or an appropriate committee of the Board set appropriate policies governing the company’s use of swaps subject to the End-User Exception and to review those policies at least annually. Include these resolutions if the Board holds this responsibility and reviews these policies as part of its annual review process at this time.
Quarterly and Routine Reporting and Compliance
Summary Section of Checklist for Preparing Form 10-Q

(Note: This is the summary section of the more comprehensive checklist. Please contact the Baker & McKenzie attorney with whom you work or send an email to na.cs@bakermckenzie.com for the entire checklist as you prepare your disclosures. We update this checklist periodically as needed.)

This checklist is not intended as a substitute for appropriate review or analysis of specific rule text nor does it contain the full text of all rules or SEC instructions contained in the rules. All information in this document is subject to change and is current only as of October 2015.

Information with respect to smaller reporting companies and asset-backed issuers is omitted from this checklist. If your company falls within the regulations not covered by this checklist, we recommend you consult with the Baker & McKenzie attorney with whom you work for further guidance.

Filing Deadlines

For the first three fiscal quarters of each fiscal year:

- **large accelerated filers and accelerated filers** (as defined in Exchange Act Rule 12b-2) must file a quarterly report on Form 10-Q within **40 days** after the end of the fiscal quarter; and

- **all other filers** must file a quarterly report on Form 10-Q within **45 days** after the end of the fiscal quarter.

**Check your filing status.** We recommend that you carefully review Rule 12b-2, as the determination of whether and when a company may exit its current filing status must be measured precisely as mandated in the rule. Further guidance on Rule 12b-2 and the determination of filer status can be found in the SEC’s Compliance and Disclosure Interpretations for the Exchange Act Rules, available at
Recent Developments

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

Executive Compensation and Governance Matters

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) continues to be implemented by the SEC following its passage. In August 2015, the SEC adopted final rules to implement the CEO pay ratio disclosure requirements under Section 953(b) of the Dodd-Frank Act. The SEC’s rulemaking remains in process for certain other remaining Dodd-Frank Act governance regulatory provisions, including pay for performance, clawback policies and hedging policies, which could affect annual meeting and annual report on Form 10-K disclosures in the future. Although these rules will not impact 10-Q disclosure requirements, they are still discussed briefly below, and more information on the rules can be found in our Checklist for Preparing Form 10-K and Routine Annual Meeting Proxy Statement Checklist.

As previously noted, on August 5, 2015, the SEC adopted rules to implement the CEO pay ratio disclosure requirements under the Dodd-Frank Act. The final rules can be found at http://www.sec.gov/rules/final/2015/33-9877.pdf. The rules add new letter (u) to Item 402 of Regulation S-K, requiring that a company disclose (1) the median of the annual total compensation of all of its employees, excluding the CEO, (2) the annual total compensation of the CEO and (3) the ratio of the annual total compensation of the median employee to the CEO’s annual total compensation. Effective for the first fiscal year beginning on or after January 1, 2017, these new disclosures must be made in any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K.
On July 1, 2015, the SEC released proposed rules directing the national securities exchanges and associations to establish listing standards requiring issuers to adopt and comply with written policies for recovery of incentive-based compensation based upon accounting restatements over a period of three years and to disclose those recovery policies in accordance with SEC rules (commonly known as “clawback of executive compensation”). The proposed rules can be found at http://www.sec.gov/rules/proposed/2015/33-9861.pdf. The comment period closed September 14, 2015; as of the date of these materials, no final rules have been issued yet. As proposed, these disclosures would impact any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K.

On April 29, 2015, the SEC released proposed rules to implement the enhanced disclosure requirements for the relationship between executive compensation actually paid and the financial performance of the company (commonly known as “pay versus performance” disclosure). As proposed, the rules would require companies to include a new pay versus performance table in proxy statements and consent solicitations in which executive compensation disclosure is required pursuant to Item 402 of Regulation S-K. The proposed rules can be found at http://www.sec.gov/rules/proposed.shtml. The comment period closed on July 6, 2015; however, no final rules have been issued as of the date of these materials.

On February 9, 2015, the SEC released proposed rules to implement the hedging policy disclosure requirements under the Dodd-Frank Act. As proposed, the rules will require a company to disclose whether employees (including officers) and directors are permitted to or prohibited from engaging in hedging transactions offsetting any decreases in the market value of equity securities granted by the company as compensation or held, directly or indirectly, by such employees or directors. The current proposal does not require a company to prohibit hedging transactions. However, it does require a company to disclose whether any employee or director is permitted to engage in hedging transactions. To implement the rules, the SEC is
proposing new Item 407(i) of Regulation S-K, believing that the disclosure required is primarily corporate governance related. The SEC noted potential overlap with CD&A disclosure, as Item 402(b) of Regulation S-K lists as one example of potentially material disclosure about a company’s executive compensation program “any registrant policies regarding hedging the economic risk” of ownership of the company’s securities. The Dodd-Frank requirement is broader than the CD&A provision. Accordingly, the SEC is proposing to amend Item 402(b) to add an instruction providing that a company may satisfy any CD&A obligation to disclose material policies on hedging by named executive officers by cross-referencing the Item 407(i) disclosure to the extent that the information satisfies the CD&A disclosure requirement. As proposed, the disclosures would be required in any proxy or consent solicitation material if action is to be taken with respect to the election of directors. The proposed rules can be found at http://www.sec.gov/rules/proposed.shtml. The comment period closed on April 20, 2015; however, no final rules have been issued as of the date of these materials.

Although we will periodically supplement our annual and periodic report checklists to include final rules as they relate to disclosure and compliance matters that affect a company’s filings with the SEC, we recommend that you periodically consult the SEC’s website for Dodd-Frank Act rulemaking initiatives available at http://www.sec.gov/spotlight/dodd-frank.shtml and consult with the Baker & McKenzie attorney with whom you work as you prepare your disclosures.

**Reporting Obligations Relating to the Use of Conflict Minerals and Current Status of Payment Disclosure Rules for Resource Extraction Issuers**

**Conflict Minerals**

In 2012, the SEC adopted final rules relating to the use of certain listed minerals used in manufacturing many products, including high-tech products such as mobile telephones, computers, videogame

Consoles, digital cameras, carbide tools and jet engine components. The specific minerals (“Conflict Minerals”) consist of cassiterite, columbite-tantalite, wolframite, their “3T” derivatives (tin, tantalum and tungsten, respectively), and gold. The legislation is premised on the belief that trading in these minerals originating in the Democratic Republic of the Congo and adjoining areas (the “DRC Countries”) has financed the activities of armed groups in the region resulting in human rights violations. The new rules are intended to curb the use of Conflict Minerals originating in the DRC Countries and cut off a source of funding for the ongoing conflict.

Conflict Minerals disclosure is required to be made on a separate report called a Form SD, which is filed electronically on EDGAR. The disclosure is also required to be posted on the issuer’s website. All issuers covered by the Conflict Minerals rules must provide the required disclosure on a calendar year basis, regardless of their fiscal year end. **Reports are due on or before May 31 each year.** Conflict Minerals disclosure in Form SD is not covered by the CEO and CFO certifications and is not incorporated by reference into any “shelf registration” statements filed under the Securities Act of 1933, as amended (the “Securities Act”). Conflict Minerals disclosure on Form SD is deemed “filed,” not “furnished,” and is subject to liability for misstatements under Section 18 of the Securities Exchange Act of 1934, as amended (“Exchange Act”). For more information, the SEC’s adopting release is available at [http://www.sec.gov/rules/final/2012/34-67716.pdf](http://www.sec.gov/rules/final/2012/34-67716.pdf) and FAQs issued in May 2013 (updated April 7, 2014) are available at [http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm](http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm). In certain cases, an issuer may need to conduct an “independent private sector audit” of its supply chain and file the audit report. Our Client Alert on the topic, *SEC Conflict Minerals Reporting on the Horizon—What Public Companies Need to Know About the AICPA’s Audit Guidance*, is available at [http://bakerxchange.com/rv/ff001564afbd2b75b19448e5574dadf9d87451bb](http://bakerxchange.com/rv/ff001564afbd2b75b19448e5574dadf9d87451bb).

In July 2013, the US District Court for the District of Columbia rendered its decision in the lawsuit brought by the National
Association of Manufacturers, the US Chamber of Commerce and the Business Roundtable (collectively, “Plaintiffs”) challenging the Conflict Minerals rules. The District Court rejected the Plaintiffs’ arguments that the rule should be struck down as arbitrary and capricious and/or as a violation of the First Amendment and ruled in favor of the SEC. In August 2013, the Plaintiffs appealed the district court’s decision to the US Court of Appeals for the District of Columbia, and on April 14, 2014, the Court of Appeals issued its opinion in the case (http://documents.nam.org/IEA/Conflict%20Minerals%20Opinion.pdf). The Court of Appeals upheld most aspects of the rules and statute except finding that there is a violation of the First Amendment “to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have “not been found to be ‘DRC conflict free.’” SEC Guidance on these rules, including links to the partial stay of the rules and the statement issued by the Division of Corporation Finance, is available at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm, and our Client Alert, SEC Staff Says 2014 Conflict Minerals Reporting in Effect and on Schedule, Except for Labeling Rejected by Court of Appeals, is available at http://bakerxchange.com/rv/ff001729c2741d311dc4212c3d4fb860d39ae9ca. During the remainder of 2014 and 2015, the Court of Appeals decision remained the topic of ongoing litigation. Most recently, on August 18, 2015, after a panel rehearing requested by the SEC, the Court of Appeals confirmed its prior ruling; on October 2, 2015, the SEC and Amnesty International filed petitions seeking an en banc rehearing of the panel decision (available at http://dodd-frank.com/wp-content/uploads/2015/10/SEC-Request-for-En-Banc-Rehearing.pdf and http://www.citizen.org/documents/Filed%20Petition%20for%20Rehearing%20En%20Banc.pdf). On November 9, 2015, the Court of Appeals denied the petitions for an en banc rehearing (available at http://www.elmsustainability.com/wp-content/uploads/2015/11/amicus.pdf). The status quo is likely to be maintained for at least the current compliance period (calendar year 2015 filing due on May 31, 2016), and it continues to be unlikely that an independent private sector audit will be required for calendar year 2015. The SEC could next decide to file a petition for a writ of
certiorari seeking US Supreme Court review of the appellate court’s
decision. The timing of any further developments is not currently
known, and it is expected that litigation could continue for some time.
This area should continue to be monitored, and you should consult
with the Baker & McKenzie attorney with whom you work for further
guidance.

Current Status of Payment Disclosure Rules for Resource Extraction
Issuers

As a result of litigation in 2013, the resource extraction payments
disclosure rules are currently no longer in effect (see further
discussion below). However, on October 2, 2015, the SEC filed
notice that it proposes to adopt new final rules within 270 days
(approximately June 27, 2016).

In August 2012, the SEC adopted final rules for new annual disclosure
requirements to implement Section 1504 of the Dodd-Frank Act,
which added Section 13(q) to the Exchange Act relating to payments
to governments by US and foreign public companies for the purpose
of commercial development of oil, natural gas or minerals. The rules
apply to “Resource Extraction Issuers,” which are US and foreign
companies that are engaged in the “commercial development of oil,
natural gas and minerals” (as defined in the rules) and that are
required to file an annual report with the SEC under the Exchange
Act.

The rules did not provide exemptions for smaller reporting companies,
for any situations where foreign law may prohibit the required
disclosure, where confidentiality agreements purport to prohibit the
required disclosure or where the payments may be deemed to be
commercially or competitively sensitive information. The rules
required Resource Extraction Issuers to disclose certain payments
made (either directly by the respective issuer or through its subsidiary
or other controlled entity), during the fiscal year covered by the report,
to a foreign government or the US federal government for the purpose
of the commercial development of oil, natural gas, or minerals. Such
disclosures were also to be made on Form SD and filed electronically on EDGAR. The rules required disclosure of resource extraction payments to be made on a fiscal year basis. For more information, the SEC’s adopting release is available at http://www.sec.gov/rules/final/2012/34-67717.pdf and FAQs issued in May 2013 are available at http://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm.

The first Form SD to disclose resource extraction payments was to be filed no later than 150 calendar days after the end of the issuer’s fiscal year for fiscal years ending after September 30, 2013. However, on July 2, 2013, the US District Court for the District of Columbia vacated the resource extraction payment disclosure rules (American Petroleum Institute, et al. v. Securities and Exchange Commission and Oxfam America, Inc., Civil Action No. 12-1668). In its decision, the district court remanded the rulemaking to the SEC for further proceedings. As a result of the decision, the resource extraction payments disclosure rules are currently no longer in effect. In September 2013, the SEC decided not to appeal the district court’s decision and had not taken any further action on the rules until on September 2, 2015, the United States District Court for the District of Massachusetts ordered the SEC to file an expedited schedule for promulgating final resource extraction payment disclosure rules (see http://www.oxfamamerica.org/static/media/files/CASPER_DECISION.pdf). On October 2, 2015, the SEC filed notice that it proposes to adopt new final rules within 270 days (approximately June 27, 2016); see http://dodd-frank.com/wp-content/uploads/2015/10/SEC-Implementation-of-Resource-Extraction-Rule.pdf. Companies that may be affected by these rules should continue to monitor the SEC’s rulemaking initiatives in this area for further developments and consult with the Baker & McKenzie attorney with whom they work for further guidance.
SEC’s Disclosure Reform Project and Review of Audit Committee Disclosures

In December 2013, the SEC issued a staff report to Congress on its disclosure rules for US public companies as part of the SEC’s ongoing efforts to modernize and simplify disclosure requirements. In connection with this report, Chair Mary Jo White stated that, as a next step, she has directed the staff to develop specific recommendations for updating the rules that dictate what a company must disclose in its filings. As part of this project, the SEC will seek input from companies about how the SEC can make its disclosure rules work better and will solicit the views of investors about what type of information they want and how it can be best presented. The press release announcing this project can be found at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540530982. See also the speech given by Chair White, The Path Forward on Disclosure, available at http://www.sec.gov/News/Speech/Detail/Speech/1370539878806, the speech given in October 2014 by the Director of Corporation Finance, Keith Higgins, available at http://www.sec.gov/News/Speech/Detail/Speech/1370541320533 and the speech given in February 2015 on Effective Disclosure for the 21st Century Investor available at http://www.sec.gov/news/speech/022015-spchraf.html. Companies should review their disclosures and endeavor to make them more effective by focusing on material information for investors, reducing redundancies and eliminating outdated information. Please consult with the Baker & McKenzie attorney with whom you work for further information.

In a May 2014 speech, SEC Chair Mary Jo White noted that investors have expressed significant interest in increased transparency into audit committee activities. Chair White noted that she had asked the SEC staff to consider whether audit committee reporting requirements can be improved to make the reports more useful to investors. Furthermore, in response to continued interest in this area by investors, on July 1, 2015, the SEC published a concept release seeking public comment on current audit committee disclosure requirements, focusing on the committee’s oversight of the
independent registered public accounting firm. The comment period closed on September 8, 2015. Comments received can be found at http://www.sec.gov/comments/s7-13-15/s71315.shtml. Developments in this area are noteworthy given the increased focus on audit committee disclosures in recent proxy seasons. Companies should monitor this area for continuing developments.

SEC Staff Issues Observations on XBRL Tagging

In July 2014, staff in the Commission’s Division of Economic and Risk Analysis assessed the quality of XBRL exhibits submitted by issuers complying with the 2009 rule requirements to file financial statement information in an XBRL format and issued their observations which can be found at http://www.sec.gov/dera/reportspubs/assessment-custom-tag-rates-xbrl.html. Additionally, the Division of Corporation Finance released a sample letter (http://www.sec.gov/divisions/corpfin/guidance/xbrl-calculation-0714.htm) that was sent to public companies regarding the XBRL requirement to include calculation relationships.

Additional Developments

Developments at the Public Company Accounting Oversight Board (PCAOB)

On July 1, 2015, the PCAOB issued a concept release seeking public comment on the content and possible uses of a group of potential “audit quality indicators.” The new indicators are a potential portfolio of quantitative measures that may provide new insights about how to evaluate the quality of audits and how high quality audits are achieved. Taken together with qualitative context, the indicators may inform discussions among those concerned with the financial reporting and auditing process, for example among audit committees and audit firms. The comment period on the release closed on September 29, 2015. The PCAOB also plans to convene a public roundtable to discuss this concept release during the fourth quarter of 2015. The concept release can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket041.aspx. Because this could impact
communications between the audit committee and the auditors, we recommend that companies continue to monitor developments in this area.

On June 30, 2015, the PCAOB issued a supplemental request for comment on previous amendments it had proposed to its auditing standards to require public company and broker-dealer audit reports to include the name of the engagement partner who led the audit, along with certain other information about participants in the audit. The supplemental request indicated that the PCAOB is considering an alternative to disclosure of this information in the auditor’s report, whereby the information would be required to be disclosed on a new PCAOB form. The supplemental request for comment closed August 31, 2015. More on these proposals can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket029.aspx.

In 2014, the PCAOB adopted, and the SEC approved, Auditing Standard No. 18 (“AS18”), Related Parties, and certain other related amendments to PCAOB standards regarding significant unusual transactions in hopes of assisting the auditor in identifying fraud or other significant risks. Directed at auditors, the new and amended auditing standards expand the audit procedures required to be performed with respect to three important areas: (1) related party transactions, (2) significant unusual transactions, and (3) a company’s financial relationships and transactions with its executive officers. The standards also expand the required communications that an auditor must make to the audit committee related to these three areas, including communications of the auditor’s evaluation of the company’s relationships with related parties, further discussion between the auditor and committee regarding the business purpose of the company’s significant unusual transactions, discussion regarding any related party transactions discovered by the auditor that were not disclosed by management, and additional discussion concerning the company’s financial relationships and transactions with its executive officers. They also amend the standard governing representations that the auditor is required to periodically obtain from management. AS18 supersedes interim auditing standard AU sec. 334, Related Parties.
AS18 and the related amendments became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014, including reviews of interim financial information within these fiscal years. For more on this and a summary of AS18, see http://pcaobus.org/Rules/Rulemaking/Pages/Docket038.aspx and http://www.sec.gov/rules/pcaob/2014/34-73396.pdf. Additionally of note, under the new standards, auditors are expected to communicate with audit committees about executive compensation arrangements, and companies should consider whether the compensation committee should also be a part of those discussions. Because AS18 affects the communications between the audit committee and the auditors, we recommend that audit committees discuss the communication requirements and responsibilities together with your auditors. In the wake of AS18, a number of independent registered public accounting firms have revised their audit procedures to request that the company provide a list of all related parties, as defined in Accounting Standards Codification (ASC) 850, and their affiliated entities. We recommend that companies review their D&O Questionnaires to ensure that sufficient disclosure is made to identify all related parties and related party transactions as defined by ASC 850.

On August 13, 2013, the PCAOB released two new proposed auditing standards: (1) The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion, which would supersede portions of AU sec. 508, Reports on Audited Financial Statements, and (2) The Auditor’s Responsibilities Regarding Other Information in Certain Documents Containing Audited Financial Statements and the Related Auditor’s Report, which would supersede AU sec. 550, Other Information in Documents Containing Audited Financial Statements. If adopted, the new auditing standards would significantly change the audit report model and dramatically expand the auditor’s responsibilities in reporting on management’s disclosures outside the financial statements. Expanding auditor reports to include company-specific information, such as the auditor’s views on significant audit issues, would change fundamentally the role of the auditor and the relationship between
companies and their auditors. This is an issue that should be on the audit committee’s radar. The comment period on the proposed rules closed in December 2013; the PCAOB held a public meeting in April 2014 to obtain further input on the proposed rules. The proposed auditing standards can be found at http://pcaobus.org/Rules/Rulemaking/Pages/Docket034.aspx. The PCAOB’s standard-setting agenda dated September 30, 2015 (discussed below) notes that “[t]he staff anticipates recommending that the Board issue a reproposal of the auditor’s reporting standard for public comment in the first quarter of 2016. The staff is continuing to evaluate the proposed other information standard in light of comments received and anticipates making a recommendation for next steps to the Board at a later date.”

On September 30, 2015, the Office of the Chief Auditor of the PCAOB released its updated standard-setting agenda (available at http://pcaobus.org/Standards/Pages/default.aspx). Among other things, the agenda states that the PCAOB staff: (1) plans to repropose auditing standards and related amendments on the auditor’s report and the auditor’s responsibilities regarding other information; (2) plans to adopt rules to improve the transparency of audits by requiring disclosure of the engagement partner and certain other participants in audits, with the information to be disclosed on a new PCAOB form (versus directly in the audit report as previously proposed); and (3) continues developing a proposal for a standard on auditing accounting estimates, including fair value measurements and related disclosures.

**2013 COSO Framework**

In May 2013, the Committee of Sponsoring Organizations of the Treadway Commission (“COSO”) released its updated Internal Control - Integrated Framework (“2013 Framework”). The 2013 Framework takes into account changes in the business environment and operations over the last 20 years. Commentary has indicated that SEC staff members have said that they continue to defer to COSO’s own remarks that the 1992 Framework is superseded by the 2013

Reporting Reminders

Disclosure Requirements Relating to the Iran Threat Reduction and Syria Human Rights Act

The Iran Threat Reduction and Syria Human Rights Act of 2012 ("ITRA") represents a significant expansion of US sanctions targeting Iran because, among other things, it (1) subjects non-US entities owned or controlled by US entities to the Iranian Transactions Regulations and makes US parent companies liable for any violations, (2) requires publicly traded companies engaging in certain types of Iran-related business to publicly disclose such business to the SEC, and (3) significantly expands the petroleum-related sanctions in the Iran Sanctions Act.

Of particular importance, the ITRA requires companies subject to the reporting requirements of Section 13(a) of the Exchange Act to publicly disclose specific information about relevant Iran-related activities in annual and quarterly reports filed with the SEC for reports due on or after February 6, 2013. The SEC provided guidance to issuers in its CDIs available at http://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm#147. The CDIs confirm that negative disclosure is not required. For more information, please also see our Checklist for Preparing Form 10-K and consult with the Baker & McKenzie attorney with whom you work.

Cybersecurity Risks and Cyber Incidents

In recent years, a significant number of high profile data breaches and cyber incidents have been reported by retail companies, military contractors, chemical and energy companies, technology companies and other public companies. As a result, public companies are considering how cybersecurity risks, cyber incidents and the related impact of these issues on their operations should be disclosed in
filings made with the SEC. Cyber incidents or attacks, which have increased in number and scope in recent years, include gaining unauthorized access to digital systems for purposes of misappropriating assets or sensitive information, corrupting data, or causing operational disruption.

Given the increased importance of this issue, the SEC’s Division of Corporation Finance issued interpretive guidance in 2011 to assist registrants in assessing their disclosure obligations concerning cybersecurity risks and cyber incidents in registration statements and periodic reports. In its guidance, prepared in a manner consistent with the relevant disclosure considerations that arise in connection with any business risk, the SEC acknowledged that there are no existing disclosure requirements under the federal securities laws that specifically refer to cybersecurity risks or cyber incidents. However, the SEC reminded registrants of certain general disclosure requirements that may impose an obligation on companies to disclose this information, such as: (1) Risk Factors; (2) Management’s Discussion and Analysis; (3) Description of Business and Legal Proceedings; and (4) Financial Statement Disclosures. The SEC’s guidance is available on its website at http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm. For more information, see our Client Alert summarizing the SEC guidance available at http://www.bakermckenzie.com/ALNACybersecurityOct11/.

The SEC has also issued comments to certain companies with regards to cybersecurity disclosures. In particular, the SEC has focused on cybersecurity incidents reported in past disclosures and/or news articles. Based on the context and types of disclosures, the SEC has asked registrants to (1) confirm that such incidents are not material to the registrant’s business or results of operations so that investors are able to evaluate the risks; (2) expand on risk factor disclosure by describing the types of cybersecurity threats and attacks that were of most concern to the registrant and to discuss related consequences; or (3) to discuss whether such threats or attacks were appropriately mitigated. In addition, where a registrant’s disclosure contained technological risk, such as potential issues with hardware or software,
the SEC has asked whether such registrants have experienced any breaches, hacker attacks, unauthorized access, computer viruses and other cybersecurity risks and, if so, whether such registrants have considered risk factor disclosure about such incidents.

The SEC convened a roundtable in March 2014 to discuss the issues and challenges cybersecurity presents for market participants and public companies, and in April 2014, the SEC’s Office of Compliance Inspections and Examinations (“OCIE”) issued a Risk Alert outlining its initiative to assess cybersecurity preparedness in the securities industry (available at http://www.sec.gov/ocie/announcement/Cybersecurity-Risk-Alert--Appendix---4.15.14.pdf) as well as an Examination Sweep Summary of its observations and findings (issued February 2015 and available at www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf). The OCIE also issued another Risk Alert in September 2015 (available at www.sec.gov/ocie/announcement/ocie-2015-cybersecurity-examination-initiative.pdf) to provide additional information on the areas of focus of its second round of cybersecurity examinations. Additionally, in a June 2014 speech (http://www.sec.gov/News/Speech/Detail/Speech/1370542057946), an SEC Commissioner cautioned that some boards may not be spending sufficient time and resources on overseeing cybersecurity risks, offering the Framework for Improving Critical Infrastructure Cybersecurity, released by the National Institute of Standards and Technology in February 2014, as one conceptual roadmap for consideration. Companies should consider the nature of any cyber incidents that occur and provide the appropriate level of disclosure about such incidents in their filings.

On December 18, 2014, the Cybersecurity Enhancement Act of 2014 (see https://www.congress.gov/bill/113th-congress/senate-bill/1353) was enacted to provide for an ongoing, voluntary public-private partnership to improve cybersecurity and to strengthen cybersecurity research and development, workforce development and education, and public awareness and preparedness. On February 13, 2015, President Obama signed an Executive Order, Promoting Private Sector
Cybersecurity Information Sharing, which encourages companies to work with each other, and with the government, in a bid to deter cyber attacks. The order builds upon efforts that began in 2013 with creating voluntary cybersecurity standards for critical infrastructure, encourages companies and industries to share information with each other, creates a common set of standards and makes it easier for companies to get classified threat information needed for protection. The Executive Order is available at [https://www.whitehouse.gov/the-press-office/2015/02/13/executive-order-promoting-private-sector-cybersecurity-information-shari](https://www.whitehouse.gov/the-press-office/2015/02/13/executive-order-promoting-private-sector-cybersecurity-information-shari). No specific or affirmative SEC disclosure obligations arise from either the Cybersecurity Enhancement Act of 2014 or the Executive Order. You should continue to monitor developments in this area and consult with the Baker & McKenzie attorney with whom you work for further guidance.

Cautionary Language in Forward-Looking Statements

Section 21E of the Exchange Act requires that a registrant identify forward-looking statements and accompany those statements with meaningful cautionary language. The cautionary language should identify important factors that could cause actual results to differ materially from those in the forward-looking statement. Generally, issuers provide the disclosure about forward-looking statements at the forepart of the quarterly report on Form 10-Q, with a qualification and/or cross reference to the Risk Factors in Part II, Section 1A, and Risk Factors disclosed in other periodic reports. Issuers should carefully review and update the forward-looking statements and accompanying language as necessary to address new developments and evolving market conditions in order to maximize the benefit of the safe harbor in Section 21E.¹

¹ See Slayton v. American Express Company, 604 F.3d 758 (2d. Cir. 2010), reinforcing the need to be mindful to ensure that well-drafted forward-looking statement cautionary language accompanies forward-looking statements and providing guidance on how to better protect forward-looking statements against liability.
SEC Guidance on Presentation of Liquidity and Capital Resources Disclosures in MD&A

Item 303 of Regulation S-K requires disclosure of a company’s financial condition, changes in financial condition and results of operations. The discussion and analysis must include an identification of any known trends or any known demands, commitments, events or uncertainties that will result in (or are reasonably likely to result in) any material increase or decrease in the company’s liquidity. Similarly, the company must disclose any known material trends, favorable or unfavorable, in its capital resources and must describe any unusual or infrequent events or transactions or significant economic changes that materially affected the amount of reported income.

Specifically, this discussion must focus on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. As a reminder, a key theme in the SEC’s 1989 interpretive MD&A release, which was addressed again in the SEC’s 2003 guidance, was to encourage management to consider all relevant information in making disclosure decisions regarding known trends, events, demands, commitments and uncertainties that will result in or are reasonably likely to have a material effect on liquidity, even if the information is not otherwise disclosable.

In 2010, the SEC issued guidance on the presentation of liquidity and capital resources disclosures in the management’s discussion and analysis intended to facilitate the understanding by investors of the liquidity and funding risks facing the registrant. Among other matters, this release:

- encourages additional narrative disclosure in the context of liquidity and capital resources if the issuer’s financial statements do not adequately convey its financing arrangements during the period, such as disclosure of the financial covenants and the ratios
as of a recent date as well as disclosure of the actual interest rate for the period under such financing arrangements;

- reminds issuers that the absence of specific references in existing disclosure requirements for off-balance sheet arrangements or contractual obligations to repurchase transactions that are accounted for as sales, or to any other transfers of financial assets that are accounted for as sales, does not relieve the registrants from the disclosure requirements of Item 303(a)(1);

- encourages issuers to consider describing cash management and risk management policies that are relevant to an assessment of their financial condition;

- provides guidance about leverage ratio disclosures; and

- provides guidance about disclosures in the contractual obligations table.


Additionally, SEC staff comments in this area frequently request more meaningful analysis of the registrant’s material cash requirements, historic sources and uses of cash and material trends and uncertainties so that investors can understand the registrant’s ability to generate cash and meet cash requirements.

In preparing current disclosures, companies should also consider the expected impact of the current economic environment.

**NYSE and NASDAQ**

NYSE-listed companies should monitor and carefully review the annual letter that the NYSE customarily sends and posts in January that summarizes cumulative changes in listing standards. We also recommend that companies consult new updates on the NYSE’s

We recommend that NASDAQ-listed companies monitor correspondence received from NASDAQ and also consult the NASDAQ issuer alerts available at http://NASDAQ.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F1&manual=%2FNASDAQ%2Falerts%2FNASDAQ%2Dissalerts%2F.
Form 8-K Reporting and Compliance Memorandum

These materials are intended only for US companies with common stock listed on the NYSE or NASDAQ. As a result, they are not intended for companies that receive special treatment under US securities laws, such as foreign private issuers or investment companies.

This memorandum is not intended as a substitute for appropriate review or analysis of specific rule text nor does it contain the full text of all rules or SEC instructions contained in the rules. All information in this document is subject to change and is current only as of October 2015.

Information with respect to asset-backed issuers is omitted from this memorandum. If your company falls within regulations not covered by this memorandum, we recommend you consult the Baker & McKenzie attorney with whom you work for further guidance.

An Introduction to the Form 8-K Items

The purpose of Form 8-K is to provide current information about events that are, as stated by the SEC, “unquestionably or presumptively material events.” Form 8-K was extensively amended in 2004, 2006, 2010 and 2011.

This memorandum highlights some suggested practices and procedures for reporting companies to promote timely compliance and provides a general introduction to the Form 8-K requirements.

In connection with its top-to-bottom overhaul of Form 8-K in 2004, the SEC organized the reportable events and information filed under Form 8-K into topical categories, as listed below.

- Section 1 – Business and Operations
• Section 2 – Financial Information
• Section 3 – Securities and Trading Markets
• Section 4 – Matters Related to Accountants and Financial Statements
• Section 5 – Corporate Governance and Management
• Section 6 – Asset-Backed Securities
• Section 7 – Regulation FD
• Section 8 – Other Events
• Section 9 – Financial Statements and Exhibits

The reportable items within the primary sections are as follows:

Section 1 – Business and Operations

Item 1.01 Entry into a Material Definitive Agreement
Item 1.02 Termination of a Material Definitive Agreement
Item 1.03 Bankruptcy or Receivership
Item 1.04 Mine Safety—Reporting of Shutdowns and Patterns of Violations

1 Section 6 is not discussed in this compliance guide as it applies only to asset-backed securities, which (as defined by Regulation AB) are securities that are primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders.

2 As a result of the 2006 amendments to Form 8-K, compensatory matters are disclosed under Item 5.02 and are no longer subject to disclosure under Item 1.01 (or 1.02).
Section 2 – Financial Information

Item 2.01 Completion of Acquisition or Disposition of Assets

Item 2.02 Results of Operations and Financial Condition

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant

Item 2.04 Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement

Item 2.05 Costs Associated with Exit or Disposal Activities

Item 2.06 Material Impairments

Section 3 – Securities and Trading Markets

Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing

Item 3.02 Unregistered Sales of Equity Securities

Item 3.03 Material Modifications to Rights of Security Holders

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3 In November 2014, the SEC announced enforcement actions against 10 companies for failing to make the required disclosures about financing deals and other unregistered sales that diluted their stock. The press release is available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543368026#.VFz-v50o6Uk. The following disclosure requirements were at issue: (i) Item 1.01 of Form 8-K (disclosure of entry into a material definitive agreement); (ii) Item 3.02 of Form 8-K (disclosure of unregistered sales of equity securities in excess of specified thresholds); and (iii) Form 10-Q or 10-K (disclosure of the number of outstanding shares of common stock as of the latest practicable date). These enforcement actions highlight the importance of maintaining robust disclosure controls and procedures to reasonably ensure that Form 8-Ks are filed promptly. See “Suggested Controls and Procedures” herein.
Section 4 – Matters Related to Accountants and Financial Statements

Item 4.01   Changes in Registrant’s Certifying Accountant

Item 4.02   Non-reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

Section 5 – Corporate Governance and Management

Item 5.01   Changes in Control of Registrant

Item 5.02   Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers

Item 5.03   Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year

Item 5.04   Temporary Suspension of Trading under Registrant’s Employee Benefit Plans

Item 5.05   Amendment to the Registrant’s Code of Ethics, or Waiver of a Provision of the Code of Ethics

Item 5.06   Change in Shell Company Status

Item 5.07   Submission of Matters to a Vote of Security Holders

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4 It is important to bear in mind that the 2006 amendments to Form 8-K eliminated the presumption established by the 2004 amendments that every contract with an officer or director is material for purposes of Form 8-K filing requirements. Following the 2006 amendments, only compensatory matters for the principal executive officer, principal financial officer and any named executive officer for the prior fiscal year trigger a Form 8-K obligation.

5 In 2010, Form 8-K was revised by adding Item 5.07 “Submission of Matters to a Vote of Security Holders.” The 2010 proxy disclosure enhancement regulations removed the requirement to disclose the results of any matter that was submitted to a vote of shareholders from Forms 10-Q and 10-K and moved it to Form 8-K. In 2011, Item 5.07 was further amended by the SEC to account for the results of shareholder advisory votes under the Dodd-Frank Act.
Item 5.08 Shareholder Director Nominations

As set forth in Item 5.08(a), where a registrant is required to include shareholder director nominees in the registrant’s proxy materials pursuant to either an applicable state or foreign law provision, or a provision in the registrant’s governing documents, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N required pursuant to Exchange Act Rule 14a-18. Disclosure under Item 5.08(a) is triggered if a registrant did not hold an annual meeting last year, or changed the date of this year’s annual meeting by more than 30 calendar days from the date of last year’s meeting. In that case, a registrant would be required to file a Form 8-K within four business days after it determines the anticipated meeting date. Please note that most registrants are not required at this time to include stockholder director nominees in their proxy materials. However, an increasing number of stockholder proposals have been submitted to companies seeking proxy access bylaw provisions in recent proxy seasons. Companies should continue to monitor developments in this area.

Section 6 – Items 6.01, 6.02, 6.03, 6.04, 6.05

Section 7 – Regulation FD and Section 8 – Other Events

Under Section 7, there is only Item 7.01 “Regulation FD Disclosure,” and under Section 8, there is only Item 8.01 “Other Events.” Neither of these items mandate reporting of any specific events.

As a method of complying with Regulation FD, companies may elect to disclose under Item 7.01 information that is not otherwise required to be reported under Form 8-K. Regulation FD permits companies to either provide such information in a Form 8-K or disseminate the information through another method (or combination of methods) of

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6 For more information, see our Routine Annual Meeting Proxy Statement Checklist.
7 These items are not discussed in this memorandum; see footnote 1 above.
disclosure that is reasonably designed to provide broad, non-
exclusionary distribution of the information to the public.

Information in a Form 8-K that is provided under Item 7.01 (Regulation FD Disclosure) and exhibits to the Form 8-K relating to Item 7.01 are deemed to be “furnished” to the SEC rather than “filed” with the SEC for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, unless the company states in the Form 8-K that the information or exhibits are being filed rather than furnished or if the company specifically incorporates the information or exhibits into another periodic report or a registration statement. The foregoing applies even if the Form 8-K contains items other than Item 7.01.

Companies may choose instead to disclose Regulation FD required information under Item 8.01 if they want the information to be deemed officially “filed” and therefore incorporated by reference into other applicable filings. Companies may also utilize Item 8.01 to disclose any other information that the company voluntarily wishes to file.

Section 9 – Financial Statements and Exhibits

Under Section 9, companies list the financial statements and exhibits being included with the Form 8-K. Exhibits are only required to be filed with the Form 8-K for the following items:

- Item 1.03 (Bankruptcy or Receivership), file the plan of reorganization, arrangement or liquidation in connection with bankruptcy or receivership.

- Item 2.01 (Completion of Acquisition or Disposition of Assets), for any acquisition of a business, file the financial statements of the business acquired as specified in Rule 3-05(b) of Regulation S-X; for any transaction being reported under Item 2.01, file pro forma financial information as specified in Rule 3-05(b) of Regulation S-X. In addition, Form 8-K requires that you file copies of the plans of acquisition or disposition.
Item 2.02 (Results of Operation and Financial Condition), furnish the text of the announcement or release.

Item 4.01 (Changes in Registrant’s Certifying Accountant), file any letters from the new accountant or former accountant pursuant to Item 304 of Regulation S-K. Note: These letters may not be available at the time of the initial filing of Form 8-K and would in that case need to be filed by amendment to the Form 8-K within two business days of receipt of such letters.

Item 4.02 (Non-Reliance on Previously Issued Financial Statements or a Related Audit Report of Completed Interim Review), file the letter from the accountant as provided under Item 4.02(c). Note: The letter may not be available at the time of the initial filing of Form 8-K and would in that case need to be filed by amendment to the Form 8-K within two business days of receipt of such letter.

Item 5.02 (Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers), file any written correspondence received from a director resigning or refusing to stand for re-election because of a disagreement with the company as well as the letter from such director as provided under Item 5.02(a)(3). Note: Such letter may not be available at the time of the initial filing of Form 8-K and would in that case need to be filed by amendment to the Form 8-K within two business days of receipt of such letter.

Item 5.03 (Amendment to Articles of Incorporation or Bylaws; Change in Fiscal Year), file the text of the amendment to the articles or bylaws; if a full copy of the articles or bylaws, as amended, is not filed with the Form 8-K, a full copy must be filed as an exhibit to the next registration statement, Form 10-Q or 10-K filed by the company.
The above items expressly require inclusion of the specified document(s). For any other Form 8-K, there is no express requirement to file anything as an exhibit. However, in many cases, the document not filed with the Form 8-K will be required under Item 601 of Regulation S-K to be filed as an exhibit to the next 10-Q or 10-K. Companies have the option of voluntarily filing the exhibit with the Form 8-K and then incorporating such exhibit by reference in the next 10-Q or 10-K.

Under Item 1.01, entry into a material definitive agreement, and Item 5.02(e), adoption of a material compensatory plan for a named executive officer, although the agreement may be filed as an exhibit to the Form 8-K, an issuer must otherwise comply with the requirement to file the agreement as an exhibit to the periodic report covering the period during which the contract is executed or becomes effective per Regulation S-K Item 601.

Guidance on Form 8-K Disclosures and Mechanics of Form 8-K Filing

Reporting for Events at the Subsidiary Level

In accordance with guidance from the SEC, companies should interpret all Form 8-K items as being applicable to events that occur at the subsidiary level (domestic or foreign and consolidated or unconsolidated), other than Item 5.02 changes in directors and principal officers which are Form 8-K events only at the registrant level. Pursuant to interpretations published by the SEC, companies should disregard the fact that some Form 8-K items state that they are triggered by the specified event occurring in relation to the “registrant” (such as Items 1.01, 1.02, 2.03, 2.04) while other items of Form 8-K refer also to majority-owned subsidiaries (such as Item 2.01).

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8 A company should review the SEC’s CDIs regarding Form 8-K available at http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm, which as of the date of these materials were last updated in May 2013.
For example, entry by a subsidiary into a non-ordinary course definitive agreement that is material to the registrant is reportable under Item 1.01 and termination of such an agreement is reportable under Item 1.02. Similarly, Item 2.03 disclosure is triggered by definitive obligations or off-balance sheet arrangements of the registrant and/or its subsidiaries that are material to the registrant.

Filing Deadline

In all but a few limited cases, reports are required to be filed or furnished within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday or holiday on which the SEC is not open for business, then the four-business-day period begins on and includes the first business day thereafter.

A Form 8-K being filed to report the appointment of a new officer under Item 5.02(c) may be delayed until the date a public announcement of the appointment is made if public announcement is being made other than by means of the Form 8-K. A Form 8-K reporting information under Item 7.01 or Item 8.01, pursuant to Regulation FD, must be furnished or filed simultaneously for intentional disclosures and promptly for non-intentional disclosures. Information reported under Item 8.01 that is not Regulation FD information may be filed at any time, with no deadline.

Other timing issues to consider are the date the event is deemed to occur. For example:

- Under Item 2.01, the event being reported is the consummation of an acquisition or disposition of a significant amount of assets. The Form 8-K is filed within four business days of closing of the acquisition or disposition, not within four business days of the execution of the contract for the acquisition or disposition. Nevertheless, the filing of a Form 8-K reporting the execution of a contract for the acquisition or disposition of assets may be required earlier by Item 1.01 of Form 8-K if the registrant has
entered into a material definitive agreement not made in the ordinary course of business of the registrant (see CDI 205.01).

- Under Item 5.02(e), equity compensation plans or awards that are subject to stockholder approval are reported when that approval is received, not when the board adopts the plan or grants the award.

- Under Item 5.07 (submission of matters to a vote of security holders), results of the meeting must be reported as follows:
  
  o Preliminary voting results from shareholder meetings are required to be disclosed on Form 8-K within four business days after the meeting at which the vote was held (pursuant to SEC CDI 121A.01, the date on which the shareholder meeting ends is the triggering event for an Item 5.07 Form 8-K. Day one of the four-business-day filing period is the day after the date on which the shareholder meeting ends).
  
  o An amended Form 8-K is required to report final voting results within four business days after the final results are known.
  
  o If a company knows its final voting results within four business days after the meeting, it may simply file a Form 8-K with the final results (i.e., in that case, there is no need to file the preliminary voting results).
  
  o This Item includes results of the say-on-pay and say-on-frequency votes. Also, under subsection (d), the company must amend the Form 8-K in which it reported its voting results to disclose its ultimate decision regarding the frequency of the say-on-pay vote (which amendment must be filed no later than 150 calendar days after the annual shareholders meeting, but at least 60 calendar days prior to the company’s deadline for submission of shareholder proposals under Rule 14a-8).
Failure to File Form 8-K and Effect on Form S-3 Eligibility

A late filing of a Form 8-K to report certain events results in the company losing its eligibility to file a short form registration statement on Form S-3. However, a failure to timely file a report on Form 8-K that is required solely pursuant to Item 1.01, 1.02, 1.04, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K will not impair a company’s eligibility to use Form S-3. See General Instruction I.A.3(b) to Form S-3 and Final Rule Release 33-9286 (Dec. 21, 2011)(http://www.sec.gov/rules/final/2011/33-9286.pdf). See also CDI 106.05 with regards to furnishing an Item 2.02 Form 8-K.

Drafting of the Disclosure

For each item being reported under, companies must include within the Form 8-K the item number as well as the caption of the item, provided however that if information is required to be reported under Item 1.01 as well as other Form 8-K items, then the registrant may omit the reference to Item 1.01 as long as the disclosures required by Item 1.01 are contained within the other items being reported. Registrants are not required to include the text of the item beyond the caption.

If a filing obligation is triggered under multiple items by one event, it is permissible to draft the disclosure to appear under a single item (including in that disclosure the information required by all of the items) and then incorporate that disclosure by reference into the other items. Including the exhibit with the Form 8-K does not permit you to abbreviate the disclosure by referring to the exhibit; the disclosure must stand on its own.

A safe harbor statement in accordance with the Private Securities Litigation Reform Act of 1995 should be included within the Form 8-K if the Form 8-K contains forward-looking statements.

Coordination With Public Announcements and Investor Relations

Note that under NYSE, NASDAQ or other exchange publicity guidelines, companies should consider when to file or furnish the
Form 8-K (in most cases, after the market close and before the next market opening). A Form 8-K filing during market hours could, depending on the matter being reported, involve a discussion of (and possible imposition of) a trading halt.

The investor relations department should be made aware in advance of any Form 8-K filing. In many cases, a press release regarding the event being reported is also being issued so the investor relations department is already aware of the event and ready to address calls regarding the event. If, however, a Form 8-K is filed to report an event that has no associated press release, it is important to inform the investor relations department in advance.

Notice to Stock Exchanges

The NYSE requests telephonic or written notification of various types of announcements. See Sections 202.05, 202.06 and 204 of the NYSE Listed Company Manual, as well as recent amendments thereto in NYSE Rule Change Release No. 34-75809. For NYSE listed companies, effective September 26, 2015, the NYSE extended the pre-market hours during which companies must give notice to the NYSE before announcing material news, so that companies will have to notify the NYSE in connection with any announcements made after 7:00 a.m. ET. The amendments also provide guidance on the release of material news after the close of trading, update the acceptable methods for releasing material news and give the NYSE additional authority to halt trading in certain situations.⁹

NASDAQ requires notification in advance of any announcement of specific matters listed in IM-5250-1, Disclosure of Material Information, including “any event requiring the filing of a Form 8-K.” Therefore, each time a Form 8-K is filed, the investor relations department must notify NASDAQ in accordance with the requirements of IM-5250-1. Additionally, in October 2015, NASDAQ

⁹ A memo distributed by the NYSE discussing the changes is available at https://www.nyse.com/publicdocs/nyse/regulation/nyse/timelyalertmemo_amendment.pdf.
released guidance on the release of material information after the close of the regular market at 4:00 p.m. ET.\textsuperscript{10} The guidance also provides a reminder that changes to a company’s earnings release, dividend record, and dividend payment dates may be material information that should be promptly publicly disclosed through a Regulation FD compliant method with appropriate advance notification given to NASDAQ’s MarketWatch Department.

Companies listed on other exchanges should ascertain the exchange’s policies, if any, on these issues.

EDGAR Filing

Note that if a company waits until the fourth business day to prepare and file a Form 8-K, and wishes to file it after market close on that day, this creates a somewhat small window of time in which to assure EDGAR transmission after market close and before the 5:30 p.m. Eastern time deadline. To the extent possible, companies should draft, review and complete the approval process of the Form 8-K and exhibits, as well as the Edgarization of those, ahead of the filing date.

Furnishing Versus Filing

As discussed above, information in a Form 8-K that is provided under Item 7.01 (Regulation FD Disclosure) and exhibits to the Form 8-K relating to Item 7.01 are deemed to be “furnished” to the SEC rather than “filed” with the SEC for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, unless the company states in the Form 8-K that the information or exhibits are being filed rather than furnished or if the company specifically incorporates the information or exhibits into another periodic report or a registration statement. The foregoing applies with regard to the information contained under Item

\textsuperscript{10} See guidance at \url{http://nasdaq.cchwallstreet.com/nasdaq/pdf/nasdaq-issalerts/2015/2015-001.pdf}. The guidance recommends that companies wait until at least 4:01 p.m. ET, and preferably until 4:05 p.m. ET, before releasing material information. Companies should not release material information between 4:00 p.m. and 4:01 p.m. ET unless specific circumstances exist that require the company to act immediately.
7.01 and the Item 7.01 related exhibits even if the Form 8-K contains items other than Item 7.01.

Companies may also choose to “file” rather than “furnish” information under Item 2.02 (Results of Operations and Financial Condition) as well as exhibits for Item 2.02.

**Suggested Controls and Procedures**

Following are some suggestions to consider in establishing and reviewing the company’s disclosure controls and procedures with regard to Form 8-K reporting generally.

**Distribute this Compliance Memorandum Broadly Within the Company**

This compliance guide (including the Quick Reference Guide at Annex A) should be circulated within the company to all persons who in the normal course of their duties may become aware of information regarding events that trigger a Form 8-K reporting obligation. This would include all persons with signature authority for material contracts, including material financial obligations under any kind of lease, credit or other agreement.

The board of directors, or certain board committees, may in some situations be the first persons aware of events that trigger a Form 8-K obligation. Accordingly, the secretary of the board or committee meetings should receive a copy of this memorandum.

**Read the Text of the Form 8-K Items, the Instructions and the Interpretations**

The individuals within the company who receive a copy of this compliance memorandum should be encouraged to read the Form 8-K text, instructions and SEC interpretations since this memorandum does not discuss in detail each of the Form 8-K items or the SEC’s current position on when a Form 8-K obligation is triggered and what disclosures are required within the Form 8-K for each item. The individuals appointed by the company to be the Form 8-K compliance
monitors should become familiar with the actual text, instructions and interpretations.

Advance Planning

To the extent possible, companies should consider the Form 8-K requirements, if any, for each material event or transaction contemplated by the company before the event or transaction is approved or entered into.

Checklists of Material Agreements and Financial Obligations

The Form 8-K requirements for the categories of material definitive agreements and financial obligations are among the more difficult of the Form 8-K reporting requirements. Companies should develop an internal system to identify agreements that trigger a Form 8-K obligation under Item 1.01 (Entry into (and amendments) of Material Agreements); Item 1.02 (Termination of Material Definitive Agreements); and, Item 5.02(e) (Adoption of Material Compensatory Plan). Ideally, the fact that a Form 8-K obligation will result should be known before such entry, amendment or termination.

Companies should consider maintaining lists not only of the company’s material contracts but also of material direct financial obligations and off-balance sheet arrangements. These lists can help in monitoring developments and determining whether 8-K filings must be made.

All companies should review their recent exhibit lists in Forms 10-K and 10-Q to determine likely categories of “material contracts” as to which entry into, amendment or termination will be reportable under Items 1.01, 1.02 or 5.02(e) of Form 8-K. Based on the likely future list of material contracts, the responsible compliance person should establish internal communications so that all covered transactions are reported in advance, early enough so that the Form 8-K can be filed on time.
Similarly, for companies with existing or contemplated public and/or commercial lender credit or financing agreements or transactions, advance planning is appropriate under Form 8-K Items 1.01, 1.02, 2.03, and 2.04 in light of the specific circumstances. The status of cross-default or other acceleration clauses, financial covenants, periodic drawdowns (which must be reported on an 8-K if material alone or in the aggregate, separate from the report of the entry into the agreement), each amendment of a credit agreement and the like should be reviewed in advance based on the specific facts and circumstances.

Monitor Potential Form 8-K Obligations at Subsidiaries

As discussed above, most Form 8-K items are applicable to events that occur at the subsidiary level as well as the registrant level. Companies should make sure potential 8-K events are monitored at the subsidiary level.

Determine in Advance the Company’s General Standards of Materiality

Reviewing in advance the standards of materiality that would be appropriate for determining if an event triggers a Form 8-K obligation is recommended. These standards are relevant for the disclosures required for definitive agreements, financial obligations and any other reportable matters judged by materiality.

Some contracts or instruments are viewed as material irrespective of the amount involved, such as:

- compensatory plans, contracts or arrangements with named executive officers (and in some cases, with other executive officers);

- contracts upon which the company’s business is substantially dependent, such as supply or requirements contracts affecting a major part of the business;
• contracts for the acquisition or disposition of property, plant or equipment for consideration exceeding 15% of consolidated fixed assets; and

• any amendment to the company’s charter or bylaws.

However, generally speaking, all other commercial agreements outside ordinary course transactions with customers and suppliers will likely require an assessment of materiality. These agreements would include (but are not limited to):

• business or asset acquisition or disposition agreements;

• other extraordinary corporate transactions such as preferred stock or debt placements, warrants, registration rights agreements, standstill agreements, poison pill rights agreements and amendments, and the like;

• real estate or equipment leases;

• credit, security, or other financing agreements or arrangements;

• supply or distribution agreements;

• non-ordinary course intellectual property agreements;

• agreements with OEM or end-user customers that due to their size, dependence factors, special terms, or other considerations should be reported; and

• settlement agreements in litigation or with governmental authorities.

Materiality should be assessed in light of:

• the exhibits that the company has filed in the past (including an assessment of whether past filings have been sufficiently
...compliant with exhibit requirements or have involved “over-reporting” of agreements material at the time of the IPO but no longer material);

- the SEC’s Staff Accounting Bulletin No. 99 (http://www.sec.gov/interps/account/sab99.htm); and

- the specific requirements of Item 601(b)(10) of Regulation S-K that are effectively incorporated into Item 1.01 of Form 8-K.

Companies with significant and/or multiple debt transactions at parent or subsidiary levels or off-balance arrangements should also prepare an advance assessment of the reporting requirements for these transactions. These matters can be quite complex and vary significantly from company to company. Companies should refrain from assessing materiality solely in terms of a dollar threshold as the SEC has repeatedly reminded registrants that such an approach would be inappropriate.

Designate a Form 8-K Compliance Individual

Because of the relatively short timeframe for filing a Form 8-K and the many and varied events that trigger a Form 8-K filing obligation, it is important for reporting companies to have at least one individual within the company who is familiar with the detailed requirements of Form 8-K and stays informed about developments affecting the required Form 8-K disclosures. This individual should take the lead in establishing or regularly reviewing the company’s compliance plan for ensuring timely reports on Form 8-K. A “back-up” person should be named to assist in these matters when the primary individual may be unavailable.

The Form 8-K compliance individual should take responsibility for the following:

- maintaining the company’s knowledge about Form 8-K requirements and making sure that new SEC interpretations or other developments under Form 8-K are appropriately
communicated to all persons within the company who should be kept up to date on such matters; and

- being the “point person” to whom information is promptly reported concerning events that could trigger a Form 8-K obligation.
Annex A – Quick Reference Guide to Form 8-K

**This guide provides a brief snapshot of the Form 8-K requirements as of the date of these materials.¹ Information pertaining to Item 6.01, 6.02, 6.03, 6.04, and 6.05 is omitted from this Quick Reference Guide.

<table>
<thead>
<tr>
<th>Item</th>
<th>Deadline</th>
<th>Summary (review text of each Form 8-K item for details)</th>
</tr>
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<tbody>
<tr>
<td><strong>1.01 Entry into a material definitive agreement</strong>&lt;br&gt;four business days</td>
<td></td>
<td>Disclose any entry into or material amendment of each “material definitive agreement” made outside the ordinary course of business. Although the agreement may be filed as an exhibit to the Form 8-K, an issuer must otherwise comply with the requirement to file the agreement as an exhibit to the periodic report covering the period during which the contract is executed or becomes effective per Regulation S-K Item 601. If this Item reports a business combination subject to Rule 425 or the proxy or tender offer rules,</td>
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</tbody>
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¹ We recommend periodically consulting the SEC’s updated Compliance and Disclosure Interpretations (CDIs) for Form 8-K available at http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm.
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<tbody>
<tr>
<td>*1.01 Entry into a material definitive agreement (cont.)</td>
<td></td>
<td>check the appropriate box on the Form 8-K cover page and comply with those rules. The disclosure of employment compensation arrangements is no longer covered by Item 1.01 (or 1.02) but is now covered by Item 5.02 instead.</td>
</tr>
<tr>
<td>*1.02 Termination of a material definitive agreement</td>
<td>four business days</td>
<td>Disclose the termination of any material definitive agreement, except by normal expiration or completion of all parties’ obligations, including the facts surrounding the termination and any material early termination penalties that the company incurred.</td>
</tr>
<tr>
<td>1.03 Bankruptcy or receivership</td>
<td>four business days</td>
<td>Disclose entry into bankruptcy or receivership by the registrant or its parent or an order confirming a plan of reorganization, arrangement or liquidation.</td>
</tr>
<tr>
<td>*1.04 Mine Safety-reporting of shutdowns and patterns of violations</td>
<td>four business days</td>
<td>If the registrant or a subsidiary receives an imminent danger order under Section 107(a) of the Federal Mine Safety and Health Act, a written notice from the Mine Safety Health Administration (MHSA) of a pattern of violations of certain mandatory health or safety standards or written notice from the MHSA of the potential to have a pattern of such violations,</td>
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<tr>
<td>*1.04 Mine Safety-reporting of shutdowns and patterns of violations (cont.)</td>
<td></td>
<td>disclose the date of receipt of the order or notice, the category of order or notice and the name and location of the mine involved.</td>
</tr>
<tr>
<td><strong>Financial Information</strong></td>
<td></td>
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<tr>
<td>2.01 Completion of acquisition or disposition of assets</td>
<td>four business days</td>
<td>Disclose completed acquisitions or dispositions of a significant amount of assets by the registrant or any of its majority-owned subsidiaries outside of the ordinary course of business. This requires an accounting analysis of the “significance” of the transaction under Rule 11-01 of Regulation S-X and instruction 4 to this Item, and, if applicable, filing of financial statements and other information under Item 9.01. Review the interaction of this Item with Item 1.01 and Item 9.01.</td>
</tr>
<tr>
<td>*2.02 Results of operations and financial condition</td>
<td>four business days</td>
<td>Disclose public announcements or releases of material non-public information about results of operations and financial condition for a completed fiscal period. The Form 8-K must include the press release that the company publishes to announce financial results as an exhibit. If a company intends to rely on Item 2.02 (b) (exception to</td>
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<tr>
<td>*2.02 Results of operations and financial condition (cont.)</td>
<td></td>
<td>Form 8-K requirement in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast or similar means, refer to explicit requirements of this section and see SEC CDI 106.02. Note that the release of additional or updated material non-public information regarding a completed fiscal year or quarter would trigger an additional Item 2.02 disclosure requirement. This information is considered “furnished” and not “filed”; therefore, failure to “furnish” a report under Item 2.02 in a timely manner does not impair S-3 eligibility (see CDI 106.05).</td>
</tr>
<tr>
<td>*2.03 Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement of a registrant</td>
<td>four business days</td>
<td>Disclose entry into a material direct financial obligation, defined in this Item to include long-term debt, a capital lease, an operating lease, or short-term debt arising other than in the ordinary course of business. Disclose direct or contingent liability for a material obligation arising out of an off-balance sheet arrangement.</td>
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<tr>
<td>*2.04 Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement</td>
<td>four business days</td>
<td>Disclose any triggering event, if its consequences are material, that either causes the increase or acceleration of a direct financial obligation (including a probable loss contingency) or off-balance sheet arrangement or causes an off-balance sheet arrangement to become a direct financial obligation.</td>
</tr>
<tr>
<td>*2.05 Costs associated with exit or disposal activities</td>
<td>four business days</td>
<td>Disclose any commitment or action by the board, board committee, or an authorized officer to effect an exit or disposal plan or disposal of a long-lived asset or termination of employees under FAS 146 standards, under which material charges will be incurred under GAAP.</td>
</tr>
<tr>
<td>*2.06 Material impairments</td>
<td>four business days</td>
<td>Disclose any conclusion by the board, a board committee or an authorized officer that a material charge for asset impairment (including impairments of securities or goodwill) is required under GAAP applicable to the registrant. No Form 8-K is required if the conclusion is made in connection with certain quarter- or year-end financial statement activities and the conclusion is disclosed in the related periodic report.</td>
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<td>Item</td>
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<tr>
<td><strong>Securities &amp; Trading Market</strong></td>
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<tr>
<td>3.01 Notice of delisting or failure to satisfy a continued listing rule or standard; transfer of listing</td>
<td>four business days</td>
<td>Disclose any notice received from or sent by the registrant to its securities exchange to the effect that the company does not comply with applicable listing standards, any notice that the securities exchange is taking action to delist the registrant’s securities or issue a public reprimand, or any definitive action by the registrant to delist its securities.</td>
</tr>
<tr>
<td>3.02 Unregistered sales of equity securities</td>
<td>four business days</td>
<td>Disclose each agreement to sell (or sale of) equity securities in a transaction not registered with the SEC. This disclosure is also required in Forms 10-Q and 10-K if not reported here. No Form 8-K is required if aggregate sales since the last report in an 8-K or periodic report are less than 1% (5% for smaller reporting companies) of the outstanding shares of the class of equity securities sold.</td>
</tr>
<tr>
<td>3.03 Material modifications to rights of security holders</td>
<td>four business days</td>
<td>Disclose material modifications to the rights of the holders of any class of registered securities whether via changes to the constituent documents regarding</td>
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<tr>
<td>3.03 Material modifications to rights of security holders (cont.)</td>
<td>four business days</td>
<td>that class or by the issuance or modification of any other class of securities.</td>
</tr>
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</table>

**Matters Related to Accountants & Financial Statements**

| 4.01 Changes in registrant’s certifying accountant | four business days | Disclose the resignation, dismissal, or new engagement of the principal independent accountant to audit the registrant’s financial statements (as well as the same for any independent accountant upon whom the principal accountant expresses reliance in its report regarding a significant subsidiary). |

| *4.02 Non-reliance on previously issued financial statements or a related audit report or completed interim review | four business days | *(a) Disclose any conclusion of the board, a board committee or an authorized officer that any previously issued financial statements no longer should be relied upon because of an error as addressed in APB Opinion No. 20.  
(b) Disclose any advice or notice from the independent auditors that disclosure should be made or action should be taken to prevent future reliance on a previous audit report or interim review.  
(c) Special procedures apply if the auditors initiate this process, including a letter from the auditors addressed to the SEC stating |
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<tr>
<td>*4.02 Non-reliance on previously issued financial statements or a related audit report or completed interim review (cont.)</td>
<td>four business days</td>
<td>whether the auditors agree with the registrant’s statements in response to this Item.</td>
</tr>
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</table>

**Corporate Governance & Management**

| 5.01 Changes in control of registrant | four business days | Disclose any change in control of the company that has occurred to the knowledge of the registrant’s board, board committee or authorized officer. |

<p>| *5.02 Departure of directors or certain officers; election of directors; appointment of certain officers; compensatory arrangements of certain officers | four business days | Disclosure required in connection with the: (a) resignation or refusal to stand for re-election of a director because of a disagreement with registrant; (b) departure of principal executive officer, president, principal financial or accounting officer, principal operating officer or person performing similar functions or any “named executive officer” or any director; (c) appointment of a new principal executive officer, president, principal financial or accounting officer, principal operating officer or person |</p>
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<td>*5.02 Departure of directors or certain officers; election of directors; appointment of certain officers; compensatory arrangements of certain officers (cont.)</td>
<td></td>
<td>performing similar functions and the material terms of any employment agreement with the newly appointed officer as well as any material compensation arrangement entered into or materially amended in connection with the officer’s appointment; (d) election of a director, other than by stockholder vote; *(e) any material new compensation arrangement (whether or not written) and any material amendments thereto as to which any principal executive officer, principal financial officer or a named executive officer participates or is a party; (f) determination of the salary or bonus of a named executive officer that could not previously be calculated as of the most recent practicable date and was omitted from the Summary Compensation Table as specified in Instruction 1 to Regulation S-K Items 402(c)(2)(iii) and (iv).</td>
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<tr>
<td>5.03 Amendments to articles of incorporation or bylaws; change in fiscal year</td>
<td>four business days</td>
<td>Disclose an amendment to the articles of incorporation or bylaws that was not included in a previously filed proxy or information statement. Disclose a determination to change the company’s fiscal year other than by submitting the matter to a shareholder vote or making an amendment to the registrant’s constituent documents.</td>
</tr>
<tr>
<td>5.04 Temporary suspension of trading under registrant’s employee benefit plans</td>
<td>four business days</td>
<td>Disclose information required under Regulation BTR if trading of company stock is suspended under certain benefit plans.</td>
</tr>
<tr>
<td>5.05 Amendments to the registrant’s code of ethics, or waiver of a provision of the code of ethics</td>
<td>four business days</td>
<td>Disclose amendments to the code of ethics defined in SEC rules for the registrant’s principal executive officer, principal financial officer, principal accounting officer or controller, and any explicit or implicit waivers of this code for any of those officers. Filing not required if the registrant disclosed the required information on its website within four business days following the date of the amendment/waiver and the registrant has previously announced its intent to publish such information in this fashion in</td>
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<tr>
<td>5.05 Amendments to the registrant’s code of ethics, or waiver of a provision of the code of ethics (cont.)</td>
<td>its annual report. NYSE Listing Rule 303A.10 permits waivers to be disclosed to shareholders by distributing a press release, providing website disclosure, or by filing a current report on Form 8-K with the SEC within the four-business-day period. Under NASDAQ Rule 5610, waivers must be disclosed within four business days by filing a current report on Form 8-K, providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, or, in cases where a Form 8-K is not required, by distributing a press release.</td>
<td></td>
</tr>
<tr>
<td>5.06 Change in shell company status</td>
<td>four business days</td>
<td>If a company that was a shell company, other than a business combination related shell company, completes a transaction that has the effect of causing it to cease being a shell company, disclose the material terms of the transaction.</td>
</tr>
<tr>
<td>Item</td>
<td>Deadline</td>
<td>Summary (review text of each Form 8-K item for details)</td>
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</table>
| 5.07 Submission of matters to a vote of security holders | four business days | Shareholder voting results must be disclosed as follows:  
- Preliminary voting results from shareholder meetings are required to be disclosed on Form 8-K within four business days of the meeting at which the vote was held (pursuant to SEC CDI 121A.01, the date on which the shareholder meeting ends is the triggering event for an Item 5.07 Form 8-K.; Day one of the four-business day filing period is the day after the date on which the shareholder meeting ends).  
- An amended Form 8-K is required to report final voting results within four business days after the final results are known.  
- If a company knows its final voting results within four business days of the meeting, it may simply file a Form 8-K with the final results (i.e., in that case, there is no need to file the preliminary voting results).  
- This Item requires inclusion of the results of the say-on-pay and say-on-frequency votes. Under subsection (d), the company must amend the Form 8-K in which it reported |
<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>5.07 Submission of matters to a vote of security holders (cont.)</td>
<td></td>
<td>its voting results to disclose its ultimate decision (if not known at the time of the original Form 8-K filing) regarding the frequency of the say-on-pay vote (which amendment must be filed no later than 150 calendar days after the annual shareholders meeting, but at least 60 calendar days prior to the company’s deadline for submission of shareholder proposals under Rule 14a-8). Refer to Item 5.07 of Form 8-K for specific information about the meeting required to be disclosed.</td>
</tr>
<tr>
<td>5.08 Shareholder director nominations</td>
<td>four business days</td>
<td>If a registrant is required to include shareholder director nominees in its proxy materials pursuant to either an applicable state or foreign law provision, or a provision in the registrant’s governing documents, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must</td>
</tr>
</tbody>
</table>

2 Item 5.07(b) was amended and Item 5.07(d) was added in connection with the final rules governing Shareholder Approval of Executive Compensation and Golden Parachute Compensation under the Dodd-Frank Act. The full text of the amendments is available at [http://www.sec.gov/rules/final/2011/33-9178.pdf](http://www.sec.gov/rules/final/2011/33-9178.pdf).
<table>
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<th>Summary (review text of each Form 8-K item for details)</th>
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</thead>
</table>
| 5.08 Shareholder director nominations (cont.) | | submit the notice on Schedule 14N required pursuant to Exchange Act Rule 14a-18. Disclosure under Item 5.08(a) is triggered if a registrant did not hold an annual meeting last year, or changed the date of this year’s annual meeting by more than 30 calendar days from the date of last year’s meeting.  

(Section 6 is omitted as it applies only to asset-backed securities)

**Regulation FD**

| 7.01 Regulation FD disclosure | Simultaneously or promptly | Disclose information that the company elects to disclose through Form 8-K pursuant to Regulation FD, which requires the information to be provided simultaneously for intentional disclosures and promptly for non-intentional disclosures. This information is considered “furnished,” not “filed.” |

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3 For more on this, see our Routine Annual Meeting Proxy Statement Checklist and our Annotated Form of US Public Company Bylaws for a Delaware Corporation.
<table>
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<th>Item</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Other Events</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8.01 Other events</td>
<td>None unless under Regulation FD</td>
<td>Disclose information under this Item that the company voluntarily wishes to file. This information is filed and incorporated by reference into other applicable filings. Information that the company must provide under Regulation FD but wishes to have officially “filed” may be provided under this Item rather than Item 7.01.</td>
</tr>
<tr>
<td><strong>Financial Statements &amp; Exhibits</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9.01 Financial statements and exhibits</td>
<td>Varies</td>
<td>Covers financial statements, <em>pro forma</em> financial information and exhibits (exhibits are deemed filed or furnished depending on the relevant item requiring the particular exhibit).</td>
</tr>
</tbody>
</table>
The leading cross-border firm

Our difference is the way we think, work and behave – we combine an instinctively global perspective with a genuinely multicultural approach, enabled by collaborative relationships and yielding practical, innovative advice. Serving our clients with more than 4,200 lawyers in 47 countries, we have a deep understanding of the culture of business the world over and are able to bring the talent and experience needed to navigate complexity across practices and borders with ease.